United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 14,648

CRIMINAL.

THOMAS W. BANKS, APPELLANT,

vs.

UNITED STATES OF AMERICA,
APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA.

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Pleas and proceedings in the United States Court of Appeals for the Eighth Circuit at the September Term, 1952, of said Court, before the Honorable Archibald K. Gardner, Chief Judge, and the Honorable Joseph W. Woodrough and the Honorable Seth Thomas, Circuit Judges.

Attest:

E. E. KOCH,
Clerk of the United States Court of Appeals for the Eighth Circuit.

(Seal)

Be it Remembered that heretofore, to-wit: on the 9th day of July, A. D. 1952, an appeal from the United States District Court for the District of Minnesota was filed in the office of the Clerk of the United States Court of Appeals for the Eighth Circuit, in a certain cause wherein Thomas W. Banks was Appellant and the United States of America was Appellee.

Record printed by appellant and filed January 26, 1953, and supplemental record printed by appellee and filed February 24, 1953, on which the appeal was heard in said Court of Appeals, are in the words and figures following, to-wit:

RECORD

United States Court of Appeals

EIGHTH CIRCUIT

No. 14,648

CRIMINAL

THOMAS W. BANKS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

FILED
JAN 26 1953
E. E. KOCH

United States Court of Appeals

EIGHTH CIRCUIT

No. 14,648

CRIMINAL

THOMAS W. BANKS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

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RECORD

Indictment filed January 14 1952 in the office of the Clerk of the United States District Court for the District of Minnesota, Third Division, St. Paul, Minnesota. This indictment reads as follows:

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

CR. NO. 7446

UNITED STATES OF AMERICA

vs.

THOMAS W. BANKS

INDICTMENT

(26 USCA Sec. 145(b))

The Grand Jury Charges:

On or about the 15th day of January, 1946, in the City of St. Paul, Ramsey County, State and District of Minnesota,

THOMAS W. BANKS,

late of Minneapolis, Hennepin County, Minnesota, did willfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of Ameirca for the calendar year 1945, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Minnesota, at the City of St. Paul, Ramsey County, Minnesota, a false and fraudulent income tax return, wherein he stated that his net income for said calendar year was the sum of $20,170.11, and that the amount of tax due and owing thereon was the sum of $7,675.27; whereas, as he then and there well knew, his net income for said calendar year was the sum of $55,363.21, upon which said net income he owed to the United States of America an income tax of $31,454.61; in violation

of Section 145(b), Internal Revenue Code; 26 U.S.C.A., Sec. 145(b).

SECOND COUNT

(26 USCA 145(b))

The Grand Jury charges that on or about the 15th day of March, 1947, in the City of St. Paul, County of Ramsey, State and District of Minnesota, aforesaid, one

THOMAS W. BANKS,

the identical person named in the foregoing Count of this Indictment, did willfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Minnesota, at the City of St. Paul, Ramsey County, Minnesota, a false and fraudulent income tax return, wherein he stated that his net income for said calendar year was the sum of $27,100.99, and that the amount of tax due and owing thereon was the sum of $10,556.98; whereas, as he then and there well knew, his net income for said calendar year was the sum of $39,275.07, upon which said net income he owed to the United States of America an income tax of $17,942.34; in violation of Section 145(b), Internal Revenue Code; 26 U.S.C.A., Sec. 145(b).

THIRD COUNT

(26 USCA 145(b))

The Grand Jury charges that on or about the 15th day of March, 1948, in the City of St. Paul, County of Ramsey, State and District of Minnesota, aforesaid, one

THOMAS W. BANKS,

the identical person named in the First Count of this Indictment, did willfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him

to the United States of America for the calendar year 1947 by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Minnesota, at the City of St. Paul, Ramsey County, Minnesota, a false and fraudulent income tax return, wherein he stated that his net income for said calendar year was the sum of $20,609.29, and that the amount of tax due and owing thereon was the sum of $6,955.14; whereas, as he then and there well knew, his net income for said calendar year was the sum of $39,542.14, upon which said net income he owed to the United States of America an income tax of $17,817.24; in violation of Section 145(b), Internal Revenue Code; 26 U.S.C.A., Sec. 145(b).

A TRUE BILL

C. U. LANDRUM
United States Attorney

ROBERT ALBRECHT
Foreman

Notice of Motion, Motion and Affidavit to dismiss indictment filed February 18, 1952, in the office of the Clerk of the United States District Court, Third Division. Said Notice of Motion, Motion and Affidavit read as follows:

(Capton of Action)

NOTICE OF MOTION

TO: C. U. LANDRUM, United States Attorney
MILES W. LORD, Assistant United States Attorney
221 Federal Court Building
Saint Paul 2, Minnesota

PLEASE TAKE NOTICE, That at the Federal Courts Building, 6th and Market Streets, St. Paul 2, Minnesota, February 25th, 1952, at 10:00 o'clock A. M. or as soon there-

after as counsel can be heard, the above named defendant will move the Court as set forth in the attached motions.

HOFFMANN, DONAHUE & GRAFF
JOHN W. GRAFF
Attorneys for Defendant
1220 Minnesota Building
Saint Paul 1, Minnesota

(Caption of Action) MOTION

The defendant respectfully moves the Court as follows:

1. To dismiss the indictment returned by the Grand Jury against him under date of January 14, 1952, on the following grounds and for the following reasons:

a. There was no legal evidence before such grand jury on such date to sustain and warrant the return of such indictment.

b. There was no sufficient legal evidence before such grand jury on such date to sustain and warrant the return of such indictment.

c. That such indictment was based solely on hearsay evidence.

d. That such indictment was based solely on incompetent evidence.

e. That such indictment was based partly on hearsay and partly on incompetent evidence.

f. That such indictment was obtained on violation of the Constitution of the United States and of law.

2. To require the members of the Grand Jury and all persons who were present with such Grand Jury when the case against this defendant was presented to such Grand Jury to disclose matters occurring before such Grand Jury.

3. To permit the furnishing to counsel for the defendant of a stenographic report of the proceedings before such

Grand Jury when the case against this defendant was presented to the Grand Jury.

The foregoing motions are made upon the affidavit attached hereto and upon such oral and documentary evidence as may be adduced at the hearing of said motions. The foregoing motions are made pursuant to the Federal Rules of Criminal Procedure, particularly Rules 6 and 12 and such other rules and provisions of law as may be applicable.

HOFFMANN, DONAHUE & GRAFF
JOHN W. GRAFF
Attorneys for Defendant
1220 Minnesota Building
Saint Paul 1, Minnesota

(Caption of Action) AFFIDAVIT

STATE OF MINNESOTA
COUNTY OF RAMSEY ss

John W. Graff, being first duly sworn deposes and states as follows:

That he is an attorney at law duly admitted to practice in the state and federal courts in the State and District of Minnesota and has his office at 1220 Minnesota Building, St. Paul 1, Minnesota; that he is representing Thomas W. Banks, hereinafter referred to as the taxpayer, in the above captioned action, which action results from an indictment returned under date of January 14, 1952 by the grand jury of the United States District Court for the District of Minnesota; that said indictment charges the taxpayer in three counts with alleged violations of 26 U.S.C.A. 145(b), the specific charges being that the taxpayer willfully and knowingly attempted to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar years 1945, 1946, and 1947; that said indictment alleges that the net income and tax paid as shown by the returns of the taxpayer were as hereinafter set forth and that the net income claimed by the government and the

amount of total tax claimed by the government are as hereinafter set forth:

Year	Tax Returns		Indictment	
Involved	Net Income	Tax Paid	Net Income	Tax Due
1945	$20,170.11	$ 7,675.27	$56,363.21	$31,454.61
1946	27,100.99	10,556.98	39,275.07	17,942.34
1947	20,609.29	6,956.14	39,542.14	17,817.24
Totals	$67,880.39	$25,188.39	$135,180.42	$67,214.19

that the claimed deficiencies resulting from the net income and tax alleged in the indictment would be as follows:

Year	Net Income	Tax
1945	$36,193.10	$23,779.34
1946	12,174.08	7,385.36
1947	18,932.85	10,861.10
Totals	$67,300.03	$42,025.80

that your affiant has made some investigations of the facts and circumstances pertaining to the proposed prosecution by the United States of the taxpayer; that he makes this affidavit in support of the motions hereto attached; that he also makes this affidavit to constitute a sufficient showing to the Court that adequate grounds exist for a motion to dismiss said indictment because of matters occurring before the grand jury in order that the Court may direct members of the grand jury and all other persons who were present before such grand jury when the case against the taxpayer was presented to disclose all that transpired in the presentation of the case against the taxpayer and also in order that the Court may direct that a stenographic report of the proceedings before such grand jury when the case against the taxpayer was presented be made available to counsel for the taxpayer.

Affiant states that he has discussed the proposed tax case against the taxpayer with responsible counel in the Bureau of Internal Revenue which counsel was familiar with and

had before him at the time of such discussion a copy of the investigative report made by the Intelligence Unit of the Bureau of Internal Revenue; that such counsel advised affiant that the proposed case against the taxpayer was a so-called "net worth case" and that there was no claim in the investigative report that there was any specific unreported income capable of identification which was not included in the tax returns of the taxpayer for the calendar years 1945, 1946, and 1947; that affiant was advised that the government's starting point for their so-called net worth case was an affidavit executed by the taxpayer in July, 1937, which affidavit was not submitted in connection with any income tax matter.

Affiant further states that he has discussed the proposed tax case against the taxpayer with responsible counsel in the Department of Justice which counsel was familiar with and had before him at the time of such discussion a copy of the investigative report made by the Intelligence Unit of the Bureau of Internal Revenue; that such counsel advised affiant that the proposed case against the taxpayer was a so-called "net worth case" and that there was no claim in the investigative report that there was any specific unreported income capable of identification which was not included in the tax returns of the taxpayer for the calendar years 1945, 1946, and 1947; that affiant was advised that the government's starting point for their so-called net worth case was an affidavit executed by the taxpayer in July, 1937, which affidavit was not submitted in connection with any income tax matter.

That the taxpayer has advised affiant that he has not made any statement of any kind, either written or oral, concerning his income tax matters to any representative of the Bureau of Internal Revenue except that he has frequently made the statement that he knows of no tax that he owes but if he is shown that he owes any tax he will be glad to make arrangements for its prompt payment.

That in order for the government to be duly entitled to an indictment from a grand jury, the government must adduce competent and legal evidence under oath which evidence will: (1) overcome the presumption of innocence (2) prove all elements of the offense to be charged; and (3) convince the grand jury of guilt and that such evidence is sufficient, if unexplained and uncontradicted, to convict.

That it was incumbent, for the government before being entitled to the said indictment against the taxpayer to prove by competent and legal evidence under oath; that the affidavit executed by the taxpayer in July, 1937 was an appropriate and reliable starting point for its so-called net worth case; what the taxpayer's net worth (difference between assets and liabilities) was at the close of each of the calendar years 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, and 1947; what proportion of the taxpayer's net worth increase in each of the years was subject to income tax and what proportion of such increase in net worth during such periods was not subject to income tax; the amount reasonably expended by the taxpayer for living expense during such periods; that any substantial deficiency in income tax paid in each of the years 1945, 1946, and 1947, was the result of a wilful attempt to defeat and evade and specifying what constituted such affirmative willful attempts.

That affiant has been informed and advised that information pertaining to the proposed indictment of the taxpayer was furnished to the newspapers of the Twin Cities at least three to four days in advance of the meeting of the grand jury and that said newspapers were advised that the grand jury would convene on the morning of January 14, 1952, and that before noon an indictment would be obtained against the taxpayer; that affiant has been advised that representatives of Twin City newspapers were present in the court room of the Federal Courts Building at St. Paul, Minnesota, when the grand jury received its instructions from the Honorable Dennis F. Donovan, one of the Judges of the United States

District Court for the District of Minnesota and when six new members were sworn to act as members of the Grand Jury; that representatives of the newspapers were outside the grand jury room and were able to note the time when such grand jury commenced its sessions on January 14, 1952, how long they were in session on the morning of January 14, 1952, who testified before the grand jury on the morning of January 14, 1952; that it appears from the Minneapolis Morning Tribune for January 15, 1952 that the grand jury was called into session at 10:00 A.M. to receive instructions from Judge Donovan; that at 10:30 A.M. of that day the grand jury started hearing testimony; that at 11:30 A.M. of that day the grand jury sent word to the Court that it was ready to make a partial report to the Court; that at 11:45 A.M. the grand jury returned into Court the indictment against this taxpayer; that it appears from the Minneapolis Star for January 15, 1952 that the United States attorney and an assistant United States attorney stated that only one witness was called before the grand jury in connection with the presentation of the case against the taxpayers and that such witness was the special agent of the Intelligence Unit of the Bureau of Internal Revenue who directed the investigation into the affairs of the taxpayer.

That the conclusion is inescapable from the foregoing that the total time which could have been in presenting evidence to the grand jury had to be less than one hour since presumably the grand jury spent some time in considering the action it would take after the evidence was presented; that it is submitted as a matter of common sense that it is a physical and mental impossibility to adequately and properly by competent and legal evidence to present to a grand jury in less than one hour that an affidavit executed by the taxpayer was an appropriate and reliable starting point for the government's net worth case, what the taxpayer's net worth was at the close of each of the calendar years 1937 to 1947 inclusive; what proportion of the taxpayer's net worth in each of the years 1937 to 1947 inclusive, was subject to income tax

and what proportion of such increase in net worth during such periods was not subject to income tax; what amounts were reasonably expended by the taxpayer for living expenses during such periods; that there was a substantial deficiency in the amount of income tax paid during 1945, 1946 and 1947; that the substantial deficiency claimed was the result of a willful attempt to evade and defeat income tax; what constituted such affirmative willful attempts; that it must be obvious that all the foregoing evidence cannot be presented by one man in less than one hour without the use of a substantial amount of incompetent evidence if not all incompetet evidence; that it must be apparent that the indictment in this is the result of an endeavor to secure an indictment by a specified time and without regard or respect for the historic, legal and constitutional safeguards that should surround the presentation of a case to a grand jury; that if upon such an indictment a judgment is obtained and executed the taxpayer will be deprived of his liberty and property without due process of law as guaranteed by the Constitution of the United States.

That it is understood to be a sound and established rule of law that outside of questioning grand jurors for their vote or their sayings at their sessions and that indictment are not to be disclosed before defendants are arrested, the veil of secrecy otherwise existing concerning grand jury proceedings may be removed from all proceedings before them whenever such removal is essential to the enforcement of constitutional guarantees or to the protection or enforcement of public or private rights; that it is understood to be equally well settled that the grand jury is the organ of the Court and subject to its jurisdiction and direction and it is one of the duties of the Court to see that the acts and findings of the grand jury accord with and are not in violation of the Constitution and the law; that the constitution and the law are superior to the theoretical secrecy of the proceedings of the grand jury; that the facts in this matter demonstrate it is an extreme instance and in order to prevent clear injustice

and an abuse of judicial process, the Court should reveiw the evidence before the grand jury.

That the foregoing should make it apparent that the indictment in this case was obtained on the basis of incompetent evidence and in violation of the law and the Constitution and ample ground exists for the Court to cause a review to be made of all the evidence before the grand jury and that when this is done it will be demonstrated that the indictment should be promptly dismissed.

JOHN W. GRAFF

Subscribed and sworn to before me
this 16th day of February, 1952.

JOSEPH M. DONAHUE

Notary Public, Ramsey County, Minn.
My Commission Expires Aug. 15, 1953.

(NOTARIAL SEAL)

(Caption of Action)

Proceedings had in the above-entitled matter before the Honorable Dennis F. Donovan, one of the judges of said court, in his court room in the Federal Courts Building at St. Paul, Minnesota, on the 18th day of February, 1952, commencing at 10:00 o'clock, A.M.

Appearances:

Mr. C. U. Landrum, United States Attorney, and Mr. Miles W. Lord, Assistant United States Attorney, appearing on behalf of the Plaintiff;

Messrs. Hoffmann, Donahue & Graff, Attorneys-at-Law, St. Paul, Minnesota, by Mr. John W. Graff, appearing on behalf of the Defendant.

The following proceedings were duly had:

The Court: The United States vs. Banks.

Mr. Graff: If the Court please, may the record show that the defendant is here in the court room at the present time.

I would like to advise the Court that there has been a motion made on behalf of the defendant to dismiss the indictment. That motion was served on the United States Attorney's office this morning and was filed with the Clerk's office this morning. Now, we ask that the Court withhold the arraignment until that motion is heard and is determined.

The Court: I think I will determine it not later than the end of this week, Mr. Graff. If you are ready to go ahead now, we will hear the argument.

Mr. Lord: If the Court please, the Government is ready to argue this motion now.

The Court: Very well

Mr. Lord: We would like to have the motion decided as soon as possible.

The Court: Yes.

Mr. Graff: The motion is made returnable at the next Special Term.

Mr. Lord: That is for my benefit, if you please, Your Honor.

The Court: We will proceed with the argument this morning.

Mr. Graff: All right. May the record show at the inception, Your Honor, that our request to have the motion heard one week from today was overruled by the Court?

The Court: Well, I set it for today with the thought of having the defendant arraigned. We have re-set this several times now and it is getting to the point where the Court feels it will be dilatory to delay it further.

Mr. Graff: The only reason we are asking its delay, Your Honor—as soon as this motion is determined, we, of course,

can go ahead with the arraignment if it then should be necessary.

The Court: Yes. Well, I perhaps won't be here and I have got to take care of it now. I will be leaving next week and I don't want to put any unnecessary work on Judge Bell.

Mr. Graff: I might say, Your Honor, there is a lot of law involved in this particular matter which we would like to submit briefs on.

The Court: I presume you have your briefs ready now?

Mr. Graff: I don't have the brief ready now, Your Honor, but I can have it ready within a few days.

The Court: Well, we will proceed with the argument now and briefs can be filed on or before Friday.

Mr. Graff: Very well, Your Honor.

(Statement by Mr. Graff.)

(Statement by Mr. Lord)

(Statement by Mr. Landrum)

Following the statements of counsel it was agreed that both sides would file memorandums with the Trial Court on or before February 22, 1952. At that time Judge Donovan indicated that he will attempt to have an order filed on the Motion to Dismiss on or before February 29, 1952. Judge Donovan further indicated that word concerning the arraignment would be given by the Court some time during the next week.

Both sides filed memorandums with the Trial Court on or before February 22, 1952. Defendant's memorandum consisted of a brief on the law as well as a further showing in support of the Motions to dismiss the indictment. The portion of defendant's memorandum constituting a further showing in support of the Motions to dismiss is as follows:

(Caption of Action)

A—PREFATORY STATEMENT

The Grand Jury for the United States District Court for the District of Minnesota returned an indictment against the above-named defendant under date of January 14, 1952. The indictment is in three counts. In the first count it charges that the defendant did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States for the calendar year 1945. The second and third counts contain similar charges but pertain to the calendar years 1946 and 1947. The statute alleged to have been violated is 26 U. S. C. A. 145 (b). Pursuant to arrangements previously made, the arraignment of the defendant on the indictment was scheduled for February 18, 1952, at 10:00 A. M. Prior to the time of arraignment, a notice of motion, and supporting affidavit to dismiss the indictment were served on plaintiff's counsel and filed with the Clerk of Court. The notice of motion indicated that the motion was to be heard on February 25, 1952, 10:00 A. M. which was the next special term of the Court and the time when motions are to be made returnable. On February 18, 1952, at 10:00 A. M. counsel for the defendant advised the Court when the case was called that the defendant was present in Court and that a motion to dismiss the indictment was pending and was scheduled to be heard on February 25, 1952 at 10:00 A. M. Counsel for defendant then requested the Court in view of the pending motion to defer arraignment until the motions to dismiss were heard and determined by the Court. Counsel for the plaintiff stated to the Court that they wanted the motions to dismiss heard immediately. The Court thereupon indicated it would hear the motions immediately; counsel for defendant objected to the hearing of the motions at that time and the Court ordered the motions heard over defendant's objection. Arrangement was made at that time for the furnishing to the Court of a memorandum brief, which is to be furnished not later than February 22, 1952, at 5:00

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P. M. This constitutes not only our memorandum brief but also a further showing in support of the motions to dismiss the indictment.

B—THE MOTIONS

Reference is made to the motions themselves for greater particular. The motion in the first instance is a motion to dismiss the indictment because the indictment is not based on legal evidence but is based on hearsay and incompetent evidence and hence was obtained in violation of the Constitution and laws of the United States. In aid of this motion the Court is asked to direct that jurors and all persons who were present when the case was presented to the Grand Jury be permitted to disclose matters occurring before the Grand Jury. This request is made of the Court by the defendant as preliminarily to and in connection with a judicial proceeding brought about by the defendant's motion and a showing that grounds exist for a motion to dismiss the indictment because of matters occurring before the Grand Jury. In proceeding as the defendant is proceeding it is submitted that he is squarely within the spirit and letter of Rule 6 (e) of the Federal Rules of Criminal Procedure which expressly recognizes the mode of proceeding.

In further aid of the motion to dismiss the indictment the Court is asked to permit and direct the furnishing of a stenographic report of the proceedings before the Grand Jury. If a proper stenographic transcript is available this would, of course, be the easiest way to handle the situation rather than have Grand jurors testify or have other persons testify as to what transpired before the Grand Jury. As will be observed later herein, the testimony had to consume less than one hour and is the testimony of only one witness and hence it will be a relatively short transcript. The examination of this transcript will take but a short period of time and it is submitted that the fact that this indictment is not based upon legal evidence but is based upon hearsay and incom-

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petent evidence will be readily established. Counsel for plaintiff came into Court and stated that this is not true and that the indictment is based on legal evidence. If this statement of counsel for plaintiff is true, then it is difficult to understand why they oppose so vigorously the furnishing of the transcript. Having in mind that the facts as they happened a number of years ago cannot be changed and if in fact the government has a proper case for prosecution what possible harm can result from such disclosure. If on the other hand the government does not have a proper case for prosecution and the indictment is not based on legal evidence but is based upon hearsay and incompetent evidence it is easy to understand the vigorous opposition.

At the time of the hearing of the defendant's motion to dismiss the indictment, it was suggested that the Court have made available to it a stenographic transcript of the evidence as a part of the consideration by the Court as to whether the transcript shall be furnished to the defendant. As heretofore indicated the transcript must of necessity be short and the Court will be in an excellent position to determine whether it will be furnished.

C—THE FACTS

There is no dispute concerning the fact that an indictment was returned against the defendant under date of January 14, 1952. The indictment sets forth the following figures for the calendar years 1945, 1946 and 1947:

Year	*Tax Returns*		*Indictment*	
Involved	Net Income	Tax Paid	Net Income	Tax Due
1945	$20,170.11	$ 7,675.27	$ 56,363.21	$31,454.61
1946	27,100.99	10,556.98	39,275.07	17,942.34
1947	20,609.29	6,956.14	39,542.14	17,817.24
Totals	$67,880.39	$25,188.39	$135,180.42	$67,214.19

Based upon the foregoing figures the deficiencies claimed by the indictment are the following:

Year	Net Income	Tax
1945	$36,193.10	$23,779.34
1946	12,174.08	7,385.36
1947	18,932.85	10,861.10
Totals	$67,300.03	$42,025.80

From these figures as they appear in the indictment it is the government's claim that the defendant's net income for each of the years 1945, 1946 and 1947 was substantially in excess of the amount stated in the return. As part of its case the government must prove such substantial understatement of net income. As stated in the affidavit attached to the motion defendant's counsel was advised by responsible counsel in the Bureau of Internal Revenue and in the Department of Justice that there is no claim in the investigative report that there is no specific unreported income capable of identification which was not included in the tax returns; that the government's case was a so-called net worth case and that the starting point for the net worth case was an affidavit executed by the taxpayer in July, 1937. For the purpose of this hearing let this fact be regarded as an established fact: the government's case is a net worth case, the starting point is an affidavit executed by the taxpayer in July, 1937, and there is no specific unreported income capable of identification which was not included in the tax returns. The government has seen fit not to file any counter affidavit and hence for the purpose of this motion these facts can be deemed to be admitted. If the Court has any reluctance in accepting this as a fact, then we ask leave to call these persons as witnesses and have their testimony taken on these three points. In lieu thereof the Court may see fit to require counsel for the government to either admit or deny these three points under oath. We want the Court

to have the facts and there should be no reluctance on anyone's part in furnishing these facts to the Court.

There certainly is no question about the fact that the Grand Jury convened on January 14, 1952, and that was the first time they were in session in the year of 1952. There can be no question that the only evidence presented in support of this indictment was presented on January 14, 1952, as the case concerning this defendant was not received by the United States Attorney at St. Paul, Minnesota from the Department of Justice at Washington, D. C. until early in January, 1952. On the morning of January 14, 1952, at approximately 10:00 A. M. this Court presided when six new members were sworn in as additional members of the Grand Jury and thereafter the Court instructed the new members as to their duties and at approximately 10:30 A. M. the Grand Jury started its session. At approximately 11:30 A. M. on January 14, 1952, the Grand Jury sent word it was ready to make a partial report to the Court; that at approximately 11:45 A. M. of that morning the indictment against this defendant was returned in open Court. Certainly the Court can take judicial notice of its own activities on the morning of January 14, 1952, and that it presided in Court from approximately 10:00 A. M. to 10:30 A. M. when the six new members were sworn in and when it instructed the new members as to their duties, and that at about 11:45 A. M. the Court received this indictment in open Court. For the purpose of this hearing let these facts be regarded as having been established: the Grand Jury met on January 14, 1952 and commenced its session at about 10:30 A. M. after having been instructed by the Court; that commencing at about 10:30 A. M. the government presented testimony concerning this defendant; that at 11:30 A. M. the government had completed presenting its case and the Grand Jury had deliberated and voted on the indictment affecting this defendant; that at 11:45 A. M. the indictment against this defendant was returned in open Court.

The affidavit attached to defendant's motion states that only one witness testified before the Grand Jury in connection with the presentation of the case against the defendant and that such witness was the Special Agent of the Intelligence Unit of the Bureau of Internal Revenue who directed the investigation into the defendant's affairs. In the Minneapolis Star for Tuesday, January 15, 1952, among other things the following is stated:

> "C. U. Landrum, United States attorney, and Miles W. Lord, asisstant district attorney, who presented the grand jury evidence, disclosed today that only one witness was called before the jury. He was an agent of the intelligence unit who directed the investigation into Banks' affairs."

At the hearing there was some comment about this newspaper article and the impression was gained that the United States Attorney denied he made any statement to the Minneapolis Star but that the assistant United States attorney indicated that only one witness may have been used. For the purpose of this hearing let the fact be regarded as having been established that only one witness appeared before the Grand Jury and that he was George McKusick, a Special Agent of the Intelligence Unit of the Bureau of Internal Revenue, the agent who made the investigation of the defendant. Here again the government has seen fit not to file any counter affidavit and these facts can be deemed to be admitted. If the Court has any reluctance in accepting as facts the time spent by the Grand Jury in deliberating on this case, considering it and voting on it and also that only one witness testified before the Grand Jury, then we ask leave to call witnesses who have direct knowledge of these facts. In lieu thereof the Court may see fit to require counsel for the government to either admit or deny these facts under oath. As heretofore indicated we want the Court to have

the facts and there should be no reluctance on anyone's part in furnishing the facts to the Court.

In order that there may be no misunderstanding with respect to the allegations of fact contained in this Section C—entitled "The Facts" we contend that these facts have been proven and have not been disputed but if the Court should take the view that these facts have not been proved then we hereby offer to prove the facts by calling witnesses and having their testimony taken under oath.

(Chapters marked "D", "E", "F", "G", "H" and "I" are omitted except that part of Chapter "I"—Conclusion" dealing with a further showing which part is as follows:)

Under the heading herein marked "C—The Facts" we set forth what the facts are it is our contention that these facts have been sufficiently proved. We are very desirous that this motion be determined on the merits and we do not want to be faced with a situation where the Court may say that we have not proved the facts or that the facts are alleged on information and belief and therefore are not sufficient to reach the questions that are really involved. So it is repeated with all possible emphasis, if these facts are not deemed to be proved by the present record then we want everything considered as an offer of proof and we want the Court to set it down for a hearing so that evidence may be taken and the facts established by the sworn evidence of witnesses. We think that thus far we have been denied the right of such hearing on the basis of what happened on the morning of February 18, 1952, and I am certain that this Court has no conscious desire to in any way abridge the rights under the law and constitution of this and any other defendant who may appear before it.

Memorandum and Order filed February 26, 1952, with the Clerk of the United States District Court for the District

of Minnesota, Third Division deferring determination of Motion to dismiss and setting arriagnment for February 29, 1952. Said Order and Memorandum read as follows:

(Caption of Action) ORDER

The above-entitled matter came on for hearing before the undersigned, in the Federal Courts Building, at St. Paul, Minnesota, on the 18th day of February, 1952, on motion by the defendant to dismiss the indictment herein on the grounds that said indictment is based on incompetent evidence, in violation of the Constitution and laws of the United States.

Hoffmann, Donahue & Graff, by John W. Graff, appeared for defendant in support of said motion,

and

C. U. Landrum, United States Attorney, and Miles W. Lord, Assistant United States Attorney, appeared for the United States of America in opposition thereto.

The Court having heard the oral arguments of counsel and considered the brief submitted in behalf of each party, and being fully advised in the premises,

IT IS ORDERED that the determination of said motion to dismiss the indictment be, and the same hereby is, deferred for determination at the trial of the general issue by the judge presiding at the trial of the above-entitled matter.

IT IS FURTHER ORDERED that February 29, 1952, at ten o'clock a. m., be set as and for the purpose of the arraignment of the defendant.

The Memorandum of the Court attached hereto is made a part of this Order.

Dated this 26 day of February, 1952.

DENNIS F. DONOVAN,
United States District Judge.

MEMORANDUM

The arraignment of defendant was continued from time to time at the request of defendant. The matter was last set for ten o'clock a. m. on February 18, 1952. On the last date defendant served, filed and made a motion to dismiss the indictment, and the matter was orally argued. Subsequently briefs were filed with the Court by each party, and the Court has considered all that has been said and written by counsel.

The old practice permitting consideration of a motion to quash has been abolished; hence objections to an indictment must be made by a motion to dismiss, as provided by Rule 12, Federal Rules of Criminal Procedure.

The motion was properly made by defendant before entering a plea to the indictment. Obviously, the Court is limited to its own knowledge of the matter, and the present status of the file. The affidavit and brief of defendant's counsel evidence thorough research and preparation. Suffice it to say the Court is not persuaded to require production of a reporter's transcript of the proceedings before the Grand Jury. Removal of the veil of secrecy from what transpired in the presence of that body in my opinion is not warranted at this stage of the proceeding. Granting that the indictment must be based on competent evidence, I am not impressed that the time consumed in the presentation of evidence was too little. In the presentation of evidence before the jury, time is a relative matter.

The result reached here, in keeping with Rule 12(b) (4), preserves all rights of defendant.

If defendant pleads not guilty at the time of arraignment, he should be prepared for trial, subject to the further order of the Court.

DENNIS F. DONOVAN,
United States District Judge.

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On February 29, 1952, the defendant was arraigned and entered a plea of not guilty to each of the three counts of the indictment. Immediately following the arraignment the United States of America filed and served two bills of particulars. Said two bills of particulars served and filed on February 29, 1952, read as follows:

(Caption of Action) BILL OF PARTICULARS

The United States of America, in compliance with the order of this Court entered on the 29th day of February, 1952, gives the following information:

Net Worth as of December 31, 1944

Cash and U. S. Government Bonds	$ 24,783.99
Receivables	51,449.82
Investments	68,035.04
Real estate and other property	100,154.54
Total assets	$244,423.39
Less Liabilities: Loans payable	12,684.66
Net worth as of December 31, 1944	$231,738.73

Dated: February 29, 1952.

C. U. LANDRUM

C. U. LANDRUM
United States Attorney

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(Caption of Action) **BILL OF PARTICULARS**

The United States of America, in compliance with the order of this Court entered on the 29th day of February, 1952, gives the following information:

Net Worth December 31, 1945

Cash and U. S. Government Bonds	$ 40,061.77
Receivables	60,675.12
Investments	99,124.62
Real Estate and other property	95,574.05
Total Assets	$295,435.56
Less Liabilities: Loans payable	12,084.66
Net Worth December 31, 1945	$283 350.90
Less Net Worth December 31, 1944	231,738.73
Increase in Net Worth	$ 51,612.17
Less: Non-taxable income	2,352.47
Net Worth increase of taxable income	$ 49,259.70
Plus: Living expenses and Federal Income Taxes paid	$ 10,131.17
Adjusted gross income of T. W. Banks and Reta Banks	$ 59,390.87
Less: Income reported by Reta Banks	1,374.38
Adjusted gross income of T. W. Banks	$ 58,016.49
Less: Personal deductions per return, 1945	2,653.28
Correct Net Income, 1945	$ 55,363.21
Net Income per 1945 return	20,170.11
Unreported Income 1945	$ 35,193.10

Net Worth December 31, 1946

Cash and U. S. Government Bonds	$ 6,530.14
Receivables	61,159.97
Investments	141,391.87
Real Estate and other property	110,447.62
Total Assets:	$319,529.60
Less Liabilities: Loans payable	8,584.66
Net Worth December 31, 1946	$310,944.94
Less Net Worth December 31, 1945	283,350.90
Increase in Net Worth	$ 27,594.04
Less: Non-taxable income	104.73
Net Worth increase of taxable income	$ 27,489.31
Plus: Living expenses and Federal Income Taxes Paid	17,482.44
Adjusted gross income of T. W. Banks and Reta Banks	$ 44,971.75
Less: Income reported by Reta Banks	948.40
Adjusted gross income of T. W. Banks	$ 44,023.35
Less: Personal deductions per return, 1946	4,748.28
Net income, 1946	$ 39,275.07
Net income per 1946 return	27,100.99
Unreported income, 1946	$ 12,174.08

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Net Worth December 31, 1947

Cash and U. S. Government Bonds	$ 11,211.37
Receivables	85,859.97
Investments	111,640.49
Real Estate and other property	128,149.63
Total Assets	$336,861.46
Less Liabilities: Loans payable	1,037.38
Net Worth December 31, 1947	$335,824.08
Less Net Worth December 31, 1946	310,944.94
Increase in net worth	$ 24,879.14
Less: Non-taxable income	2,283.28
Net Worth increase of taxable income	$ 22,595.86
Plus: Living expenses and Federal Income Taxes Paid	21,565.66
Adjusted gross income of T. W. Banks and Reta Banks	$ 44,161.52
Less: Income reported by Reta Banks	352.42
Adjusted gross income of T. W. Banks	$ 43,809.10
Less: Personal deductions per 1947 return	4,266.96
Net income for 1947	$ 39,542.14
Net income per 1947 return	20,609.29
Unreported income, 1947	$ 18,932.85

Dated: February 29th, 1952.

C. U. LANDRUM
United States Attorney

Notice of Motion, Motion and Affidavit for additional Bill of Particulars filed with the Clerk of the United States

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District Court Third Division, St. Paul, Minnesota. Said Notice of Motion, Motion and Affidavit read as follows:

(Caption of Action) NOTICE OF MOTION

TO: C. U. LANDRUM, United States Attorney
MILES W. LORD, Assistant United States Attorney
221 Federal Courts Building
Saint Paul 2, Minnesota

PLEASE TAKE NOTICE, that at the Federal Courts Building, 6th and Market Streets, Saint Paul 2, Minnesota, at a Special Term of said Court to be held on March 24, 1952, at 10:00 o'clock A. M. or as soon thereafter as counsel can be heard, the above-named defendant will move the Court as set forth in the attached motion.

HOFFMANN, DONAHUE & GRAFF
JOHN W. GRAFF
Attorneys for Defendant
1220 Minnesota Building
Saint Paul 1, Minnesota

(Caption of Action)

MOTION FOR BILL OF PARTICULARS

The defendant hereby moves the Court to require the plaintiff to furnish to him a bill of particulars concerning the indictment in the above-entitled matter as set forth herein:

1. With reference to the first count of the indictment, particulars are requested whether there is any claim made by the plaintiff that deductions from gross income in the 1945 tax return of the defendant are false in whole or in part.

2. If the particulars furnished pertaining to the request numbered one show that there are certain deductions from

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gross income in the 1945 tax return of the defendant claimed by the plaintiff to be false in whole or in part, particulars are requested stating the amount of and identificaton of each such deduction claimed by plaintiff to be false.

3. With reference to the first count of the indictment, particulars are requested stating whether it is the claim of the plaintiff that the gross income of the defendant was understated for the year 1945.

4. With reference to the first count of the indictment, particulars are requested listing the amount of and source of each item constituting the gross income claimed by the plaintiff that the defendant had for the year 1945.

5. With reference to the first count of the indictment, particulars are requested listing each item and the amount of each such item which are claimed by plaintiff to have been omitted from the gross income reported by the defendant for the year 1945.

6. With reference to the first count of the indictment, particulars are requested listing the amount of and source of each item constituting the net income claimed by the plaintiff that defendant had for the year 1945, which is claimed in the indictment to be in the amount of $56,363.21.

7. With reference to the first count of the indictment, particulars are requested listing each item and the amount of each such item which are claimed to have been omitted from the net income reported by the defendant for the year 1945.

8. With reference to the first count in the indictment, particulars are requested whether it is claimed by the plaintiff that taxable income was received by the defendant during 1945 from sources other than those shown on the tax return of the defendant for the year 1945.

9. With reference to the first count in the indictment, particulars are requested whether the plaintiff claims that

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the taxpayer did not receive funds during 1945 which were not taxable income.

10. With reference to the first count in the indictment, particulars are requested whether the amount of alleged net income for 1945 of the defendant set forth in the indictment is derived and obtained solely by plaintiff by the use of the so-called net worth method.

11. With reference to the first count in the indictment, particulars are requested that if the amount of alleged net income for 1945 of the defendant set forth in the indictment is not derived and obtained solely by plaintiff by the use of the so-called net worth method then what specific items and their amounts are claimed by the plaintiff to have been omitted from the net income reported by the defendant in his tax return for 1945..

12. If the method used by the plaintiff in determining the alleged net income of the defendant for the year 1945 was by use of the so-called net worth method particulars are requested naming the first year constituting the starting point of plaintiff's net worth computations used in determining the claimed net income of the defendant for the year 1945.

13. With reference to the second count of the indictment, particulars are requested whether there is any claim made by the plaintiff that deductions from gross income in the 1946 tax return of the defendant are false in whole or in part.

14. If the particulars furnished pertaining to the request numbered thirteen show that there are certain deductions from gross income in the 1946 tax return of the defendant claimed by the plaintiff to be false in whole or in part, particulars are requested stating the amount of and identification of each such deduction claimed by plaintiff to be false.

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15. With reference to the second count of the indictment, particulars are requested stating whether it is the claim of the plaintiff that the gross income of the defendant was understated for the year 1946.

16. With reference to the first count of the indictment, particulars are requested listing the amount of and source of each item constituting the gross income claimed by the plaintiff that the defendant had for the year 1946.

17. With reference to the second count of the indictment, particulars are requested listing the amount of each such item which are claimed by plaintiff to have been omitted from the gross income reported by the defendant for the year 1946.

18. With reference to the second count of the indictment, particulars are requested listing the amount of and source of each item constituting the net income claimed by the plaintiff that defendant had for the year 1946, which is claimed in the indictment to be in the amount of $39,275.07.

19. With reference to the second count of the indictment, particulars are requested listing each item and the amount of each such item which are claimed to have been omitted from the net income reported by the defendant for the year 1946.

20. With reference to the second count in the indictment, particulars are requested whether it is claimed by the plaintiff that taxable income was received by the defendant during 1946 from sources other than those shown on the tax return of the defendant for the year 1946.

21. With reference to the second count in the indictment, particulars are requested whether the plaintiff claims that the taxpayer did not receive funds during 1946 which were not taxable income.

22. With reference to the second count in the indictment,

particulars are requested whether the amount of alleged net income for 1946 of the defendant set forth in the indictment is derived and obtained solely by plaintiff by the use of the so-called net worth method.

23. With reference to the second count in the indictment, particulars are requested that if the amount of alleged net income for 1946 of the defendant set forth in the indictment is not derived and obtained solely by plaintiff by the use of the so-called net worth method then what specific items and their amounts are claimed by the plaintiff to have been omitted from the net income reported by the defendant in his tax return for 1946.

24. If the method used by the plaintiff in determining the alleged net income of the defendant for the year 1946 was by use of the so-called net worth method, particulars are requested naming the first year constituting the starting point of plaintiff's net worth computations used in determining the claimed net income of the defendant for the year 1946.

25. With reference to the third count of the indictment, particulars are requested whether there is any claim made by the plaintiff that deductions from gross income in the 1947 tax return are false in whole or in part.

26. If the particulars furnished pertaining to the request numbered twenty-five show that there are certain deductions from gross income in the 1947 tax return of the defendant claimed by the plaintiff to be false in whole or in part particulars are requested stating the amount of and identification of each such deduction claimed by plaintiff to be false.

27. With reference to the third count of the indictment, particulars are requested stating whether it is the claim of the plaintiff that the gross income of the defendant is understated for the year 1947.

28. With reference to the third count of the indictment,

particulars are requested listing this amount of and source of each item constituting the gross income claimed by the plaintiff that the defendant had for the year 1947.

29. With reference to the third count of the indictment, particulars are requested listing each item and the amount of each such item which are claimed by plaintiff to have been omitted from the gross income reported by the defendant for the year 1947.

30. With reference to the third count of the indictment, particulars are requested listing the amount of and source of each item constituting the claimed net income claimed by the plaintiff that defendant had for the year 1947 which is claimed in the indictment to be in the amount of $39,542.14.

31. With reference to the third count of the indictment, particulars are requested listing each item and the amount of each such item which are claimed to have been omitted from the net income reported by the defendant for the year 1947.

32. With reference to the third count in the indictment, particulars are requested whether it is claimed by the plaintiff that taxable income was received by the defendant during 1947 from sources other than those shown on the tax return for the year 1947.

33. With reference to the third count in the indictment, particulars are requested whether the plaintiff claims that the taxpayer did not receive funds during 1947 which were not taxable income.

34. With reference to the third count in the indictment, particulars are requested whether the amount of alleged net income for 1947 of the defendant set forth in the indictment is derived and obtained solely by plaintiff by the use of the so-called net worth method.

35. With reference to the third count in the indictment, particulars are requested that if the amount of alleged net

income for 1947 of the defendant set forth in the indictment is not derived and obtained solely by plaintiff by the use of the so-called net worth method then what specific items and their amounts are claimed by the plaintiff to have been omit ted from the net income reported by the defendant in his tax return for 1947.

36. If the method used by the plaintiff in determining the alleged net income of the defendant for the year 1947 was by use of the so-called net worth method, particulars are requested naming the first year constituting the starting point of plaintiff's net worth computations used in determining the claimed net income of the defendant for the year 1947.

37. For the first year constituting the starting point of plaintiff's net worth computations for the years 1945, 1946, and 1947, please furnish the following particulars as of December 31st of such first year:

(a) *Cash*—List location of each amount of cash and the amount in each location.

(b) *Government Bonds*—List each bond and the amount of each such bond.

(c) *Investments*—List each investment and the amount in each investment.

(d) *Receivables*—List each receivable and the amount in each such receivable.

(e) *Real Estate*—List each piece of real estate and the value ascribed to each such piece of real estate.

(f) *Other Property*—List each other item of property claimed to be owned by the defendant and the value of each such item of property.

(g) *Liabilities*—List each item of liabilities and the amount of each such item of lability.

(h) *Non-Taxable Income*—List each item of non-taxable

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income and the amount of each such item of nontaxable income.

(i) *Living Expenses*—List the items of living expenses and the amount of each item of living expense. Items of living expense can be grouped under general headings such as food, clothing, medical expenses, etc.

38. Please furnish the particulars requested in request numbered thirty-seven (a) to (i) inclusive for each year subsequent to the starting point year up to and including the year 1947.

At the time and place heretofore indicated for the hearing of said motion, request will also be made such other and further relief as to the Court may seem just and proper. Said motion is made pursuant to Rule 7 (b) of the Federal Rules of Criminal Procedure and is based upon all the files, records and proceedings heretofore had and of file in the above-captioned matter, the affidavit hereto attached, such other development as may transpire pertaining to this matter.

HOFFMANN, DONAHUE & GRAFF
JOHN W. GRAFF
Attorneys for Defendant
1220 Minnesota Building
Saint Paul 1, Minnesota

(Caption of Action) AFFIDAVIT

State of Minnesota, County of Ramsey, ss.

John W. Graff, being first duly sworn deposes and states as follows:

That he is an attorney at law duly admitted to practice in the state and federal courts in the State and District of Minnesota and has his office at 1220 Minnesota Building, St. Paul 1, Minnesota; that he is representing Thomas W. Banks in the above captioned action, which action results from an indictment returned under date of January 14, 1952, by the

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Grand Jury of the United States District Court for the District of Minnesota; that said indictment charges the taxpayer in three counts with alleged violations of 26 U. S. C. A. 145 (b), the specific charges being that the taxpayer willfully and knowingly attempted to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar years 1945, 1946, and 1947.

That he has prepared the foregoing motion and notice of motion for a bill of particulars which motion is made pursuant to Rule 7 (f) of the Rules of Criminal Procedure; that the purpose of the bill of particulars requested is to secure a more specific statement of the facts than set forth in the indictment and to prevent surprise at the trial by the production of evidence that the defendant would not be prepared to meet; that the indictment contains but a terse statement of the charge made against the defendant and that unless the defendant is advised as requested in the motion for a bill of particulars, the substantial rights of the defendant will be prejudiced; that the defendant is entitled to the bill of particulars requested because the indictment, although probably sufficient in law to charge an offense, is so lacking in particularity and in information and is so extremely general in the language of the charge that the defendant is not given a fair and reasonable opportunity to prepare for his defense.

JOHN W. GRAFF

Subscribed and sworn to before me this 10th day of March, 1952.

RAE D. IRWIN
Notary Public, Ramsey County, Minn.
My Commission Expires July 22, 1953.

Affidavit of George H. McKusick filed February 24, 1952, with the Clerk of the United States District Court, Third Division at St. Paul, Minnesota, in opposition to defendant's

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request for a bill of particulars. Said Affidavit reads as follows:

(Caption of Action) AFFIDAVIT

STATE OF MINNESOTA
COUNTY OF RAMSEY ss.

GEORGE H. McKUSICK, being first duly sworn, deposes and says that he is a Special Agent, Intelligence Division, Bureau of Internal Revenue; that in the course of his duties as such Special Agent he was assigned to investigate the tax liability of the above named defendant; that the sources from which he obtained the information by which he arrived at the tax liability of the defendant were the following: Signed sworn statements made by the defendant to the Government; the defendant's signed and sworn tax returns; the books and records of various business ventures in which the defendant is interested; the records of various banks with whom and through whom the defendant had transacted business; public records and documents in the City, Federal and County Courthouses and various public offices in the State of Minnesota; the answers to certain questions which were given by the defendant through his attorney and agent-in-fact, J. A. O'Gordon, and by interviews with various persons who owed the defendant money, who had borrowed money from defendant, or were otherwise connected with defendant in business transactions;

Affiant further states that during the entire course of his investigation, the defendant refused to be interviewed by affiant or other agents, but instead made his representations through Mr. Weinstock, his accountant and attorney-in-fact, Mr. O'Gordon, his attorney-in-fact, Mr. Archie M. Carey, a Minneapolis attorney, who was engaged in various ventures with the defendant, Simon Meshbesher, a Minneapolis attorney, who has represented him in various business transac-

tions, and Philip A. Brancheau, a real estate dealer who carried on various transactions for the defendant;

During the course of the investigation, affiant was making certain routine inquiries of Simon Meshbesher as to his dealings with the defendant, and at said time Mr. Meshbesher inquired as to a means whereby the investigation could be brought to a speedy conclusion; affiant thereupon invited Mr. Meshbesher and the defendant to attend a conference in the office of Special Agent in Charge, A. A. Stone, Bureau of Internal Revenue, St. Paul, Minnesota; the defendant did not appear at this meeting to answer questions and substantiate his returns as to his tax liability, since at this point it was incumbent upon the defendant to substantiate the returns as he had made them; he elected instead to send representatives O'Gordon and Meshbesher to the meeting; Attorney O'Gordon proposed that questions be submitted in writing to him, and that he would refer them to the defendant who would answer them; O'Gordon thereafter filed a power-of-attorney running from the defendant to himself and after said power-of-attorney was signed, certain questions were submitted to the defendant through his agent, Mr. O'Gordon; that after some three months, Mr. O'Gordon returned with the defendant's answer to said questions; that the answers to said questions indicate that the defendant is well aware of the various evidentiary material that has been collected by affiant and other agents, but which is not a part of public records or included in the records of defendant's various enterprises; that from time to time, in the course of the investigation, affiant, in making the inquiries of the defendant's agents and attorneys, has had occasion to discuss certain other items involved in the Government's case, and that the answers given by the defendant's agents and attorneys indicate that they are well aware of the facts in controversy;

Affiant further states that Mr. O'Gordon, who represented

defendant during four previous tax investigations, and the defendant himself were aware of the fact that such an investigation was taking place since 1946, and has had the six intervening years within which to prepare his own showing of the true facts concerning his income;

Affiant further states that during the month of February, 1952, he was advised by Miles W. Lord, Assistant United States Attorney, that he should prepare a Bill of Particulars, in which Bill of Particulars he should set out the various categories of property ownership which the Government contended were owned by the defendant, and that he should further give the defendant's beginning net worth and his net worth at the close of each of the years involved herein, and a specific itemization for the beginning and close of each of the prosecuting years showing the type and amount of each of the items which go to constitute the total net worth figure broken down into the following categories: Cash and U. S. Government bonds, receivables, investments, real estate and other property, and the liabilities then existing; Mr. Lord advised affiant that this must be done promptly at the defendant's arraignment, in order that the defendant would not be prejudiced and could prepare himself for trial at the April Term in St. Paul, Minnesota;

Affiant further states that in compliance with this request, he, in conjunction with Revenue Agent Gerald O. Kleven, who was also assigned to this case, prepared such statements for the prosecution years, and that he was in court when such statements were presented to the attorney for defendant, the date on which this was done being the 29th day of March, 1952;

Further affiant saith not, except that this affidavit is made in support of the Government's position in opposing a motion for Supplementary Bill of Particulars.

GEORGE H. McKUSICK

Subscribed and sworn to before me this 24th day of March, 1952.

MILDRED E. JOHNSON

Notary Public, Ramsey County, Minn.
My Commission expires November 30, 1958.

Order and Memorandum filed March 31, 1952, with the Clerk of the United States District Court, Third Division, St. Paul, Minnesota, denying defendant's motion for a bill of particulars. Said Order and Memorandum read as follows:

(Caption of Action.)

ORDER

Thomas W. Banks, the above named defendant, on March 24, 1952, at the Federal Courts Building, St. Paul, Minnesota, presented to the undersigned Judge of this Court a motion for an order requiring the United States of America, plaintiff, to furnish a bill of particulars concerning the indictment in the above entitled action.

Mr. Miles W. Lord appeared for the plaintiff.

Mr. John W. Graff appeared for the defendant.

On the files and records in the case, the briefs and arguments of counsel and on due consideration.

IT IS ORDERED, That said motion be and it hereby in all respects is overruled.

Dated: March 31, 1952.

By the Court:

ROBERT C. BELL
United States District Judge

(Caption of Action.)

MEMORANDUM

An indictment containing three counts was returned against the defendant January 14, 1952, by a Grand Jury acting within and for the State of Minnesota in which he is charged with tax evasions for the years 1945, 1946 and 1947 in violation of 26 U. S. C. A. 145 (b). On February 29, 1952, the defendant was arraigned at which time he entered a plea of not guilty to each of the three counts of the indictment. Following the arraignment the government furnished to the defendant a bill of particulars supplementing the allegations of the indictment.

On March 24, 1952, the defendant presented to the court a motion for a bill of particulars. The motion is resisted by the plaintiff.

At the conclusion of the oral argument on the motion, the court allowed the defendant till March 27, 1952, to file a Memorandum. The Memorandum has been filed and carefully considered by the Court.

The motion for a bill of particulars in this case is made pursuant to Rule 7 (f) of the Federal Rules of Criminal Procedure which provide that the court may for cause direct the filing of a bill of particulars and further that a motion for a bill of particulars must be made within ten days after arraignment or at such other time as may be provided by rule or as the court may direct. Neither Rule 7 (f) nor any other rule contained in the Federal Rules of Criminal Procedure provide under what circumstances the court shall grant a bill of particulars or under what circumstances it should be denied. The grounds for allowing or refusing a bill of particulars must be found in the law as developed by the courts in cases of this kind. The rules do not provide what information may be sought in a bill of particulars and resort also must be had to the law as developed by the courts.

It is well settled that the allowance of a bill of particulars is in the sound discretion of the court and is to be exercised according to the circumstances of the case. Wong Tai v. United States, 273 U. S. 77. The purpose of a bill of particulars is to inform the accused of the nature of the charge with sufficient precision to enable him to prepare for trial, to prevent surprise, and to plead his acquittal or conviction in bar of any prosecution for the same offense.

In the case under consideration the court has examined the bill of particulars voluntarily furnished by the plaintiff. The record shows that the defendant's financial affairs have been under examination at least four times in the past by agents of the Bureau of Internal Revenue and that in the course of the present investigation, which was commenced in 1946, he was represented by lawyers and tax experts and that he is fully conversant with facts pertaining to the taxation of his income and property. Moreover, it appears that the information of the plaintiff was obtained from the books and records of the defendant, from public records, banking institutions with which the defendant has transacted business, stockbrokers where the defendant has purchased and sold stocks and securities. Where information obtained by the government is already within the defendant's knowledge a bill of particulars is wholly unnecessary. United States v. Kelley, 92 F. Supp. 672, in which the court said:

> "The rule with respect to bills of particular in criminal indictments is expressed in 42 C. J. S., Indictments and Informations, s 156 p. 1092, as follows: 'Its purpose is to enable accused to prepare his defense and to avoid surprise at the trial, to plead his acquittal or conviction in bar of another prosecution for the same offense, and to compel the prosecution to observe certain limitations in offering evidence. It is not the function of the bill to furnish accused with the evidence of the prosecution.'
>
> * * * * *

"He does not need a bill of particulars to help him prepare his defense for the reason, as heretofore stated, he is more familiar with the source of his income than is the government and neither could he be surprised in view of the government's frank statement that its proof will involve income from sundry sources commingled in a single bank account. In United States v. Kushner, 135 F. 2d 668, 673, the Court of Appeals, 2 Cir., said in respect a denial of a motion for a bill of particulars, that such a "denial must stand 'in the absence of a showing that appellant was unfairly surprised or prejudiced at the trial by the Government's evidence.' And then the court said: 'Actually, also the bill partook more of the nature of a fishing expedition than of a reasonable request for information upon the part of one who denied all knowledge of or participation in the importation of any gold bullion.'"

The language of the court in United States v. Andrews, 97 F. Supp. 572, is appropriate here.

"A rule of guidance, as it is understood, is that the government will not be required to make a disclosure in detail of its evidence. Each case, of course, depends upon its own peculiar facts, but the effect of granting of this motion in toto would be to require the government to disclose substantially upon all of its evidence. * * *"

* * * * *

"Further, the government should state, without itemizing, the total receipts from the defendant's advertising businesses claimed to be unreported; the total of the amount charged on defendant's books as business expenses which were used either for purchase of capital assets or for personal use which are claimed to be unreported; the total of cash withdrawals by the defendant transferred to his personal account and claimed to

have been falsely charged to expenses; the total of fictitious entries in defendant's books of alleged expenses claimed to never have been incurred; the total of receipts of rent from real estate unreported; and the total income from oil leases unreported."

Consequently, it appears that the information sought is already within the defendant's knowledge or is available to him; that the defendant will be able to prepare his case and to avoid surprise at the trial; that the defendant will be able to plead his acquittal or conviction in bar of another prosecution for the same offense without obtaining the information requested. Obviously, this is a so-called "net worth" case and the defendant not only has all the evidence pertaining to his financial affairs during the period involved but also the theory of the prosecution. As we have seen, the function of a bill of particulars is not to furnish accused with the evidence of the prosecution, but rather is to furnish the essential facts on which the alleged offense is based.

The motion is overruled.

Dated: March 31, 1952.

By the Court:

ROBERT C. BELL
United States District Judge

At the opening of the April, 1952, term of the United States District Court for the District of Minnesota, Third Division, held at St. Paul, Minnesota, on April 1st, 1952, the defendant moved the Court for a continuance of the trial of his case to the November, 1952 term of such Court. This motion of the defendant was denied and the Trial Court set the case down for trial on May 19, 1952.

Transcript of Proceedings and Testimony commencing on May 19, 1952.

(Caption of Action)

Proceedings had in the above-entitled matter before the Honorable Robert C. Bell, one of the Judges of said Court, and a jury, in Court Room No. 1, Federal Courts Building, St. Paul, Minnesota, commencing on the 19th day of May, 1952, at 10:00 o'clock, A. M.

PRESENT:

Mr. C. U. Landrum, appearing specially for the United States Attorney for the District of Minnesota; Mr. Miles W. Lord, Assistant United States Attorney for the District of Minnesota; and
Mr. Richard Buhrman, appeared specially on behalf of the Tax Division of the Department of Justice, Washington, D. C.

Messrs. Hoffmann, Donahue & Graff, Attorneys-at-Law, 1220 Minnesota Building, St. Paul, Minnesota, by Mr. A. Jerome Hoffmann and Mr. John W. Graff, and Mr. Richard E. Kyle, Attorney-at-Law, W2162 First National Bank Building, St. Paul, Minnesota, appearing on behalf of the Defendant.

(The following proceedings were had in the Court's Chambers:)

THE COURT: You may present your motion, Mr. Graff.

MR. GRAFF: If the Court please, on behalf of the defendant, at this time we ask an opportunity to further present the motion which was previously presented to the Court to dismiss the indictment herein on the ground and for the reason that the evidence adduced before this Grand Jury was such that there could not validly be returned an indictment.

In order that I may put the motion in its proper focus, it is going to be necessary for me to advise the Court of some

of the surrounding circumstances since this was presented to another Judge of this court and I am assuming that this Court has not been advised as to what transpired at that time.

Under date of February 18, 1952, a motion was made on behalf of the defendant, which motion was served on the United States Attorney's office on February 18, 1952, and was filed with the Clerk of this Court on the same date. For greater particularity, reference is made to the notice of motion, the motion, and the affidavit attached thereto. The motion was returnable on the next special term day, which was February 25, 1952. Notwithstanding the fact that the motion was made specifically returnable under date of February 25, 1952, the trial court, over the objection of counsel, insisted that the matter be heard on February 18, 1952. The reason given by the Court sitting at that time was this—and I quote from the transcript of the proceedings at that time—"Well, I perhaps won't be here and I have got to take care of it now. I will be leaving next week and I don't want to put any unnecessary work on Judge Bell."

In view of the Court's ruling at that time we argued the motion to the Court on the morning of February 18, 1952. We asked the Court at that time to submit oral testimony and the Court indicated that it did not want to hear any oral testimony at that time. We then proceeded and argued the motion on both sides, and pursuant to arrangement made, briefs were filed with the Court I think on February 22nd or 23rd of 1952, which was the same week. Thereafter, Judge Donovan made an order dated February 26, 1952, and I make reference to the order for greater particularity, but one portion of the order reads as follows: "It is ordered that the determination of said motion to dismiss the indictment be and the same hereby is deferred for determination at the trial of the general issue by the Judge presiding at the trial of the above-entitled matter."

The Federal Rules of criminal procedure provide in Rule 12(B)(4) as follows:

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"A motion before trial raising defenses or objections shall be determined before trial unless the Court orders that it be deferred for determination at the trial of the general issue."

I am assuming that Judge Donovan's order was made pursuant to this particular provision, although the order does not so state.

In connection with hearings on motion, Rule 12(B)(4) provides: "All other issues of fact"—and this is on motions—"shall be determined by the Court with or without a jury, or on affidavits, or in such other manner as the Court may direct."

In this case we have submitted the motion on affidavit and we have requested in our moving papers that we wish to take oral testimony in connection with the motion. Under date of January 14, 1952, the Grand Jury for the District of Minnesota was reconvened. It is my understanding that this Grand Jury had been previously called and they were called back to again consider matters commencing on Monday, January 14, 1952. At that time the jury reported here to Judge Donovan at 10 o'clock in the morning of January 14, 1952. There were six new members of the Grand Jury who had to be instructed by the Court and who were sworn in as members of this Grand Jury. At approximately 10:30 on January 14, 1952, the Grand Jury left the court room of Judge Donovan and proceeded to go into the Grand Jury Room. At 11:30, approximately one hour later, the Grand Jury sent word to Judge Donovan that it was ready to make a partial report to the Court. At 11:45 A.M. on January 14, 1952, the jury did report to Judge Donovan and returned one indictment, the indictment in this particular case, United States vs. Thomas W. Banks, No. 7446, Criminal.

The noon editions of the newspaper carried stories of the indictment. Now, the indictment against this taxpayer is an indictment under Section 145(B) of Title 26, U.S.C.A., which is commonly referred to as the "Tax Evasion Section" of the Internal Revenue Laws. That is a felony, and the indict-

ment charges in three counts, three separate offenses. It charges for the year '45 that there was an attempt to evade and defeat income tax in the amount of $23,779.34; it charges that for the year 1945 the defendant had a net income of $56,363.21; that the tax on that amount of net income would be $31,454.61; that the taxpayer made a return indicating that his net income was $21,170.11, and that the tax paid by the taxpayer was $7,675.27.

The reason that I meticulously go into the figures is because these are matters presumably which should have been the subject of proof before the Grand Jury.

In the second count, which covered the year 1946, the net income disclosed by the tax return was $27,100.99. The tax paid was $10,556.98. The indictment charges that the net income was $39,275.07; that there was a tax due on that amount in the sum of $17,942.34; that there was a deficiency in net income amounting to $12,174.08, and there was a deficiency in tax amounting to $7,385.36.

The indictment shows that the third count charges the same offense with respect to the year 1947, and that the taxpayer in his return showed a net income of $20,609.29; and that he paid a tax of $6,956.14. The indictment claimed that the net income was $39,542.14; that the tax which was due was $17,817.24; that there was therefore a deficiency in net income amounting to $18,932.85, and there was a tax deficiency amounting to $10,861.10.

Again I say I cite all those figures because it was necessary for the Government to adduce competent proof with respect to each and every one of these particular figures, and it would take some time just to read the figures, as evidenced by what I have just experienced.

Now, the affidavit states that there appeared in the Minneapolis Star on the afternoon of January 14, 1952, a statement attributed to the then United States Attorney and an assistant United States Attorney that there was only one witness before this Grand Jury and that such witness was a

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special agent of the Intelligence Unit of the Treasury Department who investigated the case. That fact appears from our affidavit and is, as far as the record goes, undisputed at the present time. The affidavit sets forth that as part of my work in connection with this case, that I had discussed the case with responsible counsel in the Bureau of Internal Revenue; that I was advised by responsible counsel in the Bureau of Internal Revenue, who at that time had before him and with him a copy of the investigative report made by the Intelligence Unit of the Bureau of Internal Revenue, and counsel so stated to me, that the case against this taxpayer and defendant was a so-called "net worth case;" further, that there was no claim in the investigative report that there were any specific income items capable of identification which were not included in the tax returns of the taxpayer for each of the years 1945, 1946, and 1947; that the beginning of the Government's so-called net worth case was an affidavit executed by the taxpayer in July of 1937, and which particular affidavit had not been submitted in connection with any income tax matter. The affidavit further states that I had discussed the case against the taxpayer with responsible counsel in the Department of Justice. I might say that that was in Washington, D. C.

Such counsel at the time had before him a copy of the investigative report made by the special agent who investigated the case; that such counsel advised me that the case against the taxpayer was a net worth case; that there were no specific items of income which were capable of identification and which were not included in the tax return of the taxpayer; that the starting point of the net worth case was an affidavit executed by the taxpayer in July of 1937, and that such affidavit was not submitted in connection with any income tax matter.

The affidavit also states that the defendant and the taxpayer has advised me that at no time has he made any statement, either written or oral, concerning his income tax

matters to any representative of the Bureau of Internal Revenue except that he has made the statement that he knows of no tax that he owes.

Of course, the obvious reason for that is to preclude any claim on the part of anybody that there was any confession or admission against interest, or any extra judicial statement which might be attributed to the taxpayer.

On the basis of this record, it was then incumbent upon the United States, if they wished to seek an indictment against this defendant, to present to a Grand Jury proper, competent evidence, which would warrant the return of the indictment. Under the circumstances which existed, the type of case we have—a so-called net worth case—the absence of any admissions by the taxpayer, the type of starting point which was had, and only one witness,—I state without fear of contradiction from anyone that it was a physical and mental impossibility to present a net worth case against this or any other taxpayer under the conditions then and there existing, and that the return of an indictment under the circumstances under which it was returned was an indictment which was not founded upon competent evidence. It was an indictment which violated the constitutional rights of this defendant.

We may say,—What should a Grand Jury have before it before it can return an indictment? I think the following statement from American Jurisprudence is as good a statement as I could find: "It is the general rule and almost universal practice for a Grand Jury to find indictments on the testimony of witnesses appearing and testifying before it under oath, and it is the common law rule that indictments should be founded upon credible evidence that there is probable cause for an accusation against the person accused. The common law rule of probable cause is equally controlling in the modern practice in the absence of statutes requiring a higher degree of proof. Under this rule, credible evidence which exists in the minds of the Grand Jury, means an

honest and reasonable belief that an offense has been committed and that the accused is guilty of it, is a sufficient basis to warrant a finding in return of an indictment against him, although under the express terms of the statutes, a greater quantum of proof may be required."

This Court has instructed grand juries many, many times on their duties. I have heard the Court instruct them on some of those occasions. This Court has instructed grand juries and knows the rule very well that grand juries are only to consider competent testimony, and that no testimony other than competent testimony and testimony which would be admissible in court should be presented to a grand jury.

The Court: You will soon be through?

Mr. Graff: Yes, shortly, Your Honor.

Now, I might say to Your Honor that it is a matter of common knowledge that only one witness testified before this Grand Jury. There are three newspaper men out there that I am satisfied I can call any one of them and they will so testify. I don't want to embarrass them in any way. I say it is a matter of common knowledge that only one person testified before this Grand Jury, and it is a matter of common knowledge who this particular person is. I do not want to proceed in this matter in any manner other than on a clear representation of the facts to the Court. But it is my understanding that those are the facts. Now, if those are the facts, I see no reason why there should be any apprehension or reluctance on the part of the persons representing the United States in this matter to admit them. If they do not choose to admit them, then we would like to take oral testimony to establish those facts.

Now, I have reserved the question of what the effect will be of an indictment which is returned on the basis of improper and incompetent testimony. I might say in brief that it is our position that it cannot stand and that a con-

viction fastened on such an indictment would be improper and should not be permitted to stand.

Now, other than argument of the question of the facts where they are established, I would like to close at this time unless my associates think something further should be added.

(Remarks off the record.)

Mr. Graff: (Continuing) I might say, Your Honor, that my proposal to take the testimony at this point does not go into the question of what was said before the Grand Jury, but, rather, what the true facts were as to what happened before the Grand Jury,—not the testimony, so I am not asking the court to hear any testimony.

The Court: Very well.

Mr. Landrum: If the Court please, in the beginning I wish to say that I am sure we all realize that what counsel proposes to this Court is most extraordinary and unusual. This matter was presented to Judge Donovan fully. It was argued by both sides and briefed by both sides. We have now heard counsel read portions of the affidavit upon which his motion is based. An examination of that affidavit will disclose that except for excerpts drawn from the indictment itself, practically each and every allegation in it is made on hearsay and is incompetent and is immaterial.

As we read the books, in order for this motion to prevail, there must be presented to this Court a clear and positive showing, based upon facts and not based upon what someone read in some newspapers, or what someone told him down in Washington, or what someone else may have said to him. We do not dispute the fact that if this affidavit was based upon a proper showing, that this Court might take further testimony; but it is our position that that showing is wholly

lacking in the affidavit which has been presented in support of this motion.

I must address myself just a moment to the proposition that he quotes, or talks about something that appeared in the Minneapolis Star. That has occurred before and it occurred in the argument before Judge Donovan wherein it was stated in the affidavit which is presented here in support of this motion that I, C. U. Landrum, and Miles W. Lord, assistant United States Attorney, stated that only one witness was presented to that Grand Jury. When that statement was made in Judge Donovan's court, I arose and said that so far as I was concerned that was not true. I made no such statement to any reporter of any newspaper, and I repeat it now as an officer of this Court.

So we say that in order for him to prevail in this motion, he must come in here with some sort of a showing based upon something clear and concise. Now, averments on information and belief have been uniformly held to be insufficient showing for this purpose. The case of the United States vs. American Medical Association, 26 Federal Supplement, 429 so holds.

The Eighth Circuit has decided many leading cases on this subject. In McKinney vs. the United States, 199 Fed. 25, the indictment which was there being attacked was found by the Grand Jury upon the evidence of a single Post Office Inspector who testified to many things which would not be the "best evidence" or strictly speaking admissible in a contested matter. The Court there states the rules which have since been used as guides in matters of this kind.

In Anderson vs. the United States, 273 Fed. 20, C. A. 8, 1921, it was alleged that certain papers which were submitted as evidence to the grand jury were wrongfully seized. The court in sustaining the denial of the defendant's motion said this:

" * * * We understand the rule to be that an indictment cannot be set aside or avoided on such an objection unless it affirmatively appear that there was no evidence of the commission of the offenses presented to the grand jury, or unless all of the evidence which it heard on the inquiry was unlawfully procured in violation of some fundamental right of the party indicted, and which would be barred on the trial as incompetent and inadmissible against him. This Court has so decided in McKinney vs. the United States, 199 Fed. 25; 117 C. C. A., 403. * * *"

In Murdick vs. United States, 15 Fed. 2nd, 965, (C. A. 8, 1926) the Court cites the Anderson case and again refers to the opinion in McKinney vs. United States as settling the question in this jurisdiction.

Now, counsel has submitted in support of this motion his own affidavit. In that affidavit he makes certain statements as to his conclusions, based upon information and belief, to the effect that the Grand Jury was in session for only a short time, and that they could not possibly have received and considered proof of a net worth case as defendant's counsel believes it must be presented.

Such evidence, if it may be called evidence—and we contend that counsel's statement and his conclusions are not evidence—we contend that although they are uncontroverted, they should not be considered. That is in the Medical Association case which I have just cited, and it is plainly stated there. Now, counsel says that there is no opposing affidavit, and in view of the fact that there is no affidavit opposing his affidavit, which is submitted on information and belief, therefore the facts set forth in his affidavit must be true.

Now, if Your Honor please, that is the vice of the situation. In other words, he says, "Why, the Government should come in here and by affidavit tell us what was presented to the Grand Jury."—therefore getting the very information which

he seeks in this motion by virtue of an affidavit submitted in opposition to his.

Now, the constitutional guarantees of a defendant are not violated by irregularities, such as presenting incompetent evidence to a Grand Jury and that was decided in the McKinney case.

If Your Honor please, we have searched and it is submitted that none of the cases in any jurisdiction have ever held that such conclusions, based upon hearsay, are sufficient evidence to cause an inquiry into the proceedings before a Grand Jury. It is further submitted that even if such conclusions are taken to be facts, that the facts set forth concerning the circumstances under which the indictment was returned do not constitute a sufficient showing to make the inquiry requested.

In other words, to boil it down, if Your Honor please, here they seek a most extraordinary thing. They seek something which all of us as lawyers have always felt that we had a very definite opinion upon, and that was the right to go behind the action of a Grand Jury and to inquire with relation to what took place before a Grand Jury, and I am sure that it has been the opinion of all of us, as it has been mine, that in order that such action might be taken, it could only be taken upon the most clear and concise showing in support of the motion. We therefore say that inasmuch as this affidavit simply says that counsel was informed by reading the newspaper that there was only one witness before the Grand Jury, that counsel was informed by some lawyer down in the tax division of the Department of Justice that this was based upon an affidavit in 1937, that he had received this information and that information,—that the affidavit in support of this motion is absolutely insufficent upon which Your Honor should grant it, and upon that we stand.

Mr. Graff: If the Court please, in connection with the comment of counsel and the cases that were submitted, we

have cited many of the cases in our brief. I think that the cases referred to by counsel were all decided prior to the advent of the new criminal rules, and in that connection I want to call the Court's attention to Rule 6(e) pertaining to the disclosure of matters happening before the Grand Jury. The particular portion that I have in mind is this: Speaking of disclosure, the rule states, "Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the Grand Jury only when so directed by the Court, preliminary to or in connection with a judicial proceedings, or when they are permitted by the Court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the Grand Jury."

We submit that this provision of this rule is applicable to this particular situation. Now, there must be at this stage of the proceeding something that must be readily apparent to the Court. I do not think this Court was here at the time that this indictment was returned. I think this Court should know what the fact was.

Is it a fact that this is a net worth case? Is it a fact that only one witness appeared? Is it a fact that there was less than one hour consumed in the presentation of this case to the Grand Jury?

Now, unless those facts are made available to the Court, the Court is going to have a little bit of difficulty in determining this motion on its merits. The bill of particulars which was furnished by the Government demonstrates that it is a net worth case and I think the memorandum of the Court, made in connection with the bill of particulars, makes the same observation.

Now, we insist upon our right to take oral testimony in connection with this motion since apparently counsel for

the Government do not see fit to advise the Court what the facts are, and I think this Court should not be deprived of what the facts are.

The Court: Is there anything further, gentlemen?

Mr. Landrum: That is all the Government has, Your Honor.

The Court: If this motion is overruled, are you ready to proceed with the trial of this case?

Mr. Landrum: The Government is ready.

The Court: The defendant is ready?

Mr. Graff: Yes, Your Honor, but as I indicated, we feel that we have a right to present oral testimony and we specifically request the exercise of that right in connection with our motion to establish the facts.

The Court: You want to present oral testimony as to the evidence that was presented to the Grand Jury?

Mr. Graff: No, Your Honor, I don't want to go into the evidence that was presented to the Grand Jury. I simply want to establish those facts for the record.

The Court: You want to establish the fact that a very short time was taken to present the testimony to the Grand Jury and that it was impossible to fully or sufficiently present the facts to the Grand Jury in the length of time that was occupied?

Mr. Graff: That is part of it, Your Honor. I also want to establish the fact that if it is a net worth case, that only one person testified, and some other facts along that line. It is not going to take long at all.

Now, right on that point, counsel mentioned that the vice of the matter was that we tried to get them to make an affidavit. I am not trying to get the other side to do anything.

They will have to proceed as they see fit. We have made an affidavit in connection with our motion. They have seen fit not to make one. Whatever the reasons are, I do not know, except as stated by counsel.

Now, as to our affidavit, I think for the purpose of this motion the Court will have to assume the facts are as stated in our affidavit. Nothing else has been presented to the Court by way of the facts, and as a further presentation of facts we want to present oral testimony simply as further evidence of what the facts are.

The Court: Well, you haven't undertaken to state in your affidavit the contents of the testimony that was presented to the Grand Jury?

Mr. Graff: No, Your Honor, because I don't know that, of course. I can only arrive at that by a process of what I perceive to be logical induction. We don't want to go into those facts—what the man testified to, what he said. Now, I think this: I think this Court has a perfect right to say to the Government, "You make available to me as the Court the transcript of what happened before this Grand Jury." —and then this Court can decide this motion very easily. We don't even want to see it. I would like to have the Court read it, however.

The Court: Well, of course, I had no information that this motion was coming this morning. Perhaps I should have known it. I could have ascertained that such motion might be presented this morning by examining this file and by reading Judge Donovan's order heretofore made in the case. That was made last January or February—

Mr. Graff: February 26th, Your Honor.

The Court: We can probably assume the truth of the statements made in counsel's affidavit. Counsel for the Government perhaps would be willing to concede that substantially the facts as stated are correct. That is, that an

hour's time was taken; that one witness was presented to the Grand Jury, and the matter considered by the Grand Jury for a very brief space of time when the indictment was then returned.

So I doubt if very much would be gained by offering oral testimony to prove those facts. Counsel for the defendant has stated that he could call in the newspapermen who were perhaps familiar with the facts and prove what he desires to prove. That may be true, but I am doubtful of the propriety of spending time to introduce oral testimony to prove something about which there is probably no controversy. I dislike to go into a case if there is some substantial showing that a matter of this kind should have preliminary consideraton, and yet this case has been set for trial for six or seven weeks, even since I returned and have had something to do with it. A jury has been ordered here to start the trial of this case and I am inclined to think that this motion should be overruled and that the trial should be commenced. That will be the order of the Court.

Now, are there any other matters?

Mr. Graff: There are, Your Honor, and I presume we may have an exception to the Court's order on our motion?

The Court: Certainly.

Mr. Graff: The next matter, I think probably as long as we have the reporter here, I probably would like to take that up next because there are some matters which will not require the attendance of the reporter. We wish to make a motion to dismiss Count 1 of the indictment, which refers to the calendar year of 1945, on the ground and for the reason that the offense is barred by the Statute of Limitations.

Now, unlike the previous motion, I do not wish to offer any evidence on it, and I suggest to the Court that this motion be deferred for consideration during the trial of the

case, as the testimony which will be developed will bear on this motion. I think that we are entitled to raise the question under our plea of not guilty. However, in order that the record may be adequately protected, we want to make the motion at this time for the record and then have the Court rule on it when all the testimony is in.

The Court: Very well, it may be considered when the facts have been presented that will show whether or not it is barred by the statute.

Of course, I will say this to counsel for the Government: If the claim is unquestionably barred by the statute, the Government might as well move for a dismissal—

Mr. Landrum: We realize that, Your Honor, but we think there is more to it than that statement.

The Court: Well, we will see in due time. Now, is there anything else?

Mr. Graff: We have nothing further for which we would need the reporter, Your Honor.

(Discussion off the record, after which the following proceedings were had in open court, in the court room:)

The Court: Ladies and gentlemen of the jury panel: I am anticipating a number of you are present at this time. I am sorry that there has been a delay in calling the court to session this morning, but some preliminary matters have been under consideration that have been presented to the Court by counsel for the respective parties in the case that the Court has under consideration.

Now, you have been called here to serve as jurors in the case of the United States of America vs. Thomas W. Banks. Do not permit anyone to communicate with you about this case. Perhaps I need not say that to you or to a great number of you, but very fine citizens sometimes, who are not familiar with court procedure and the matters that the

Courts have in hand, may enter into a conversation with strangers, lawyers,—perfectly thoughtlessly and without any wrongful intent, and someone may tell you many things about some suit that you as jurors might be called to pass upon, and you do not want to do that. The Court doesn't want you to and the lawyers do not want you to. So wherever you may be, with anyone you may be conversing with, just do not hear anything said to you about the case of the United States vs. Thomas W. Banks, because that is the burden that I have and that you have until it is terminated.

You may meet the lawyers who are engaged on one side or the other of this case. It may be someone of your personal acquaintance. You may feel that you can converse with the lawyer, pass the time of day, inquire about health and so on, as people often do. Now, it just isn't good policy to fraternize with the lawyers on either side of the suit that is to be tried in court. So if they may happen not to see you, they know that they shouldn't. They agree with the Court. So just pass on and they will do likewise, and it will not be embarrassing to you or to them. That is the proper procedure. Even if you meet them in the hall, just do not visit with the lawyers on either side of the table. They will understand it, and after I explain it to you as I am, you will also understand it.

Do not talk to any witnesses in this case. Do not talk to anyone about it. You may be selected on the jury; you may not. Twelve persons and two alternates will try this case. You will not all be selected and you will not be called on this jury, but some of you must serve the Court in this case. That is why you have been called here and you will become an officer of this court and it is necessary to do your duty. Citizens are not called to spend very much time in the courts of our country to pass on the civil rights of fellow citizens, pass on the freedom and liberty sometimes of citizens, and it is an important duty that you are called

upon to perform, but when many of our citizens are putting on a uniform and spending many years of their life in behalf of this country, even to the extent of engaging in war on foreign lands, you and I can afford to spend some time here to try important cases, and that is what you have been called here for.

So just avoid talking to anybody about this case or any other case that might be on the calendar at this time, and report at 1:30. You will be called at that time. If there are urgent reasons why you should be excused, the Court will undertake to find some way to excuse you. I trust not many of you will desire to be excused for any reason, but I will tell you why this afternoon an excuse might be proper. I will not go into that at this time. So you will report at 1:30 in this court room.

A number of witnesses have been called in this trial. Some may be present. You should be here and you should be here day after day until counsel who have called you excuse you, or until this Court has excused you before you leave the jurisdiction of the Court. You may be wanted tomorrow; you may not be wanted for several days. I do not know as to how long this case will last, but you should know that you are obligated under your subpoena to be here until you are excused.

Mr. Lord: If the Court please, as far as the United States Attorney's office is concerned, strictly as a matter of convenience to the witnesses, we might suggest that the Court advise them that if they are desirous of being excused, they should report to the United States Attorney's office.

The Court: You called them, did you?

Mr. Lord: We have called them into this court room, Your Honor, and at this time we would like to have the Court advise them that they are not being summoned to the United States Attorney's office, but as a matter of con-

venience to them and the Court and the United States Attorney's office, we might do some of our clerical work in the United States Attorney's office and that therefore they can, if they are desirous of being excused until we call them, report to our office directly below here and we will then make arrangements for those who have banking business to do, and such things, to go about their business until we need them.

The Court: Of course, these persons have been called here by you as witnesses and it will not be improper for you to confer with them or give them such information as may be necessary for their comfort and convenience. You can excuse them for a day or two days with direction to report in the court at such times as they may be required by you in the presentation of your case. That will be agreeable. That is true of counsel for defendant also.

The Court: Both sides have announced that they are ready for trial in this case.

Mr. Clerk, you will call a jury.

Mr. Landrum: If the Court please—

The Court: Yes.

Mr.Landrum: I would like at this time, if Your Honor please, to move the admission specially for the purpose of this case of Mr. Richard Buhrman, an attorney of the Tax Division of the Department of Justice, who sits here.

The Court: He may appear for practice in this case.

Mr. Landrum: Thank you, Your Honor.

The Court: You may call a jury, Mr. Clerk Call the panel first.

(Roll call of jury panel called by the Clerk.)

The Clerk: There are 38 jurors present, Your Honor.

The Court: Ladies and gentlemen of the panel, I announced the purpose of this jury call here before the luncheon hour. It is unfortunate that jurors must be called from their homes and their various lines of business to serve as jurors in court, but the Constitution guarantees the right of trial by jury in many cases, civil and criminal. It is necessary to have jurors serve in the courts in order to carry out the constitutional provision. That is why you are here today.

Sometimes citizens may be excused from jury service in cases of emergency, or because of bad health,—especially bad eyesight and bad hearing. If you are an officer of the State, of the County, or City, you are entitled to be excused on that ground. Members of a fire department, lawyers, doctors, dentists, and teachers are entitled to be excused from serving on the jury. The purpose of the law is obvious and I do not need to explain that. Business reasons are not an excuse for not serving on the jury. Such reasons may be considered by the Court in case of an emergency. If you are 60 years of age, or more, you are entitled to be excused.

Are there any person on this panel of 38 who desire to be excused at this time? If so, you may come forward and let me hear from you.

(Seven jurors stepped forward and presented reasons to the Court for not serving on the jury, after which two of the jurors were excused by the Court.)

The Court: Mr. Graff, do you have something?

Mr. Graff: May I hand the Court some proposed questions?

The Court: Yes.

(At this point the following proposed questions were handed to the Court.)

PROPOSED QUESTIONS TO JURY PANEL

In addition to the usual questions inquiring concerning the place of residence, the business, and questions of a similar nature, submission of the following questions is requested by and on behalf of the defendant.

Q. What Twin City newspapers, if any, do you subscribe to or read?

Q. How long have you been such a subscriber or reader?

Q. As such subscriber or reader have you on any occastion seen or read anything concerning this case?

Q. As such subscriber or reader have you on any occasion seen or read anything concerning the defendant, Thomas W. Banks?

Q. Have you read or seen anything pertaining to this case in any other newspapers, magazines, books, periodicals or other publications?

Q. Have you read or seen anything pertaining to the defendant, Thomas W. Banks in any other newspapers, magazines, books periodicals or other publications?

Q. Have you heard any radio broadcasts concerning this case?

Q. Have you heard any radio broadcasts concerning the defendant, Thomas W. Banks?

Q. Have you seen any telecasts concerning this case or any person connected with it including the defendant, Thomas W. Banks?

Q. Have you heard anyone talk about this case?

Q. Have you heard anyone talk about the defendant?

Q. Have you heard any discussion between any persons concerning this case?

Q. Have you heard any discussion between any persons concerning this defendant?

Q. Have you participated in any such discussions concerning this case?

Q. Have you participated in any such discussions concerning the defendant?

Q. Have you discussed this case with any other prospective juror?

Q. Have you ever been present at any political, fraternal, social or civic meeting or assemblage when any address or talk was delivered or had concerning the defendant, Thomas W. Banks, or this case?

Q. Have you ever heard, read or received any information concerning any such address or talk delivered or had at any such political, fraternal, social or civic meeting or assemblage concerning the defendant, Thomas W. Banks, or this case?

Q. Has anyone claimed or represented to you that he or she has any confidential information concerning this case or this defendant?

Q. Has anyone expressed any opinion to you concerning the facts of this case?

Q. Has anyone expressed any opinion to you concerning the guilt or innocence of the defendant?

If the answer to either of the two preceding questions is yes, we ask that such prospective juror then be asked:

Q. Did such person claim to have official or confidential information to support such opinion?

Q. Based upon any information of any nature that has come to you by any means from any source concerning this case or the defendant have you had or do you now have an opinion concerning the facts in this case?

Q. Based upon any information of any nature that has come to you by any means from any source concerning this case or the defendant have you had or do you now have an opinion concerning the guilt or innocence of the defendant?

Q. Do you at this time have or indulge any prejudice or bias which would prevent you from acting as a fair and impartial juror in this case?

Q. It may appear in the trial of this case that a portion of the income of the defendaat was derived from liquor and wagering activities. If it so appears, would such evidence standing alone and of itself create a prejudice or bias that will prevent you from being a fair and impartial juror?

Q. Do you have or are you aware of any prejudice or bias in this type of case as distinguished from any other so-called criminal case?

Q. Are you now or have you ever been employed by the United States, or any agency or instrumentality thereof?

Q. Is or has any member of your family been employed at any time by the United States, or any agency or instrumentality thereof?

Q. Have you ever been or are you now engaged in any law enforcement work?

Q. Is or has any member of your family been engaged in law enforcement work?

Q. Are you now or have you ever been employed by any state or any agency or instrumentality thereof?

Q. Is or has any member of your family ever been employed by any state or any agency or instrumentality thereof?

Q. Are you personally acquainted with any person employed by the Bureau of Internal Revenue?

Q. Are you personally acquainted with any person engaged in investigatorial work for the United States or any state government?

Q. Are you acquainted with any of the persons employed in the office of the United States Attorney in Saint Paul?

Q. Have any of the attorneys in that office ever represented you or members of your family or your employers in any professional capacity?

Q. Are you personally acquainted with George McKusick of the Bureau of Internal Revenue?

Q. Are you personally acquainted with Agent Kleven of the Internal Revenue Department?

Q. Are you personally acquainted with Arthur B. Stone of the Bureau of Internal Revenue?

Q. Have you ever been a member of any state or federal grand jury?

Q. Have you ever acted as a state or federal petit juror?

Q. If you have had previous jury experience was such previous jury experience in the state or federal courts or both?

Q. If you have had previous jury experience, have you ever sat upon the trial of a criminal case?

Q. If you have had previous federal jury experience, when did you last serve?

Q. Would the fact that this criminal prosecution is brought in the name of the United States in and of itself, standing alone, create any prejudice or bias which would prevent you from being a fair and impartial juror?

The Court is requested to advise the prospective jurors:

(1) That the indictment is merely the formal charge which has been placed against the defendant and is not any evidence of guilt and is not to be considered as such by the jury.

(2) Concerning the presumption of innocence with which the law surrounds any person accused of an offense.

(3) That the burden of proof is upon the government to prove the guilt of the defendant beyond a reasonable doubt.

That after the Court has explained the foregoing provisions of law concerning these matters to the prospective jurors the Court is requested to ask the jurors whether they

will follow these provisions of law in the determination of the issues of this case.

HOFFMANN, DONAHUE & GRAFF
JOHN W. GRAFF
Attorneys for Defendant
1220 Minnesota Building
Saint Paul 1, Minnesota

The Court: Mr. Clerk, you may call 28 jurors.

Now, answer as your names are called so we can hear you, so the Clerk will know that you are responding, and come forward and have seats in the jury box as directed by the Bailiff.

(The following 28 jurors were called to sit on the panel:

Mrs. Alice F. Pfeiffer, St. Paul

Charles Rea, Red Wing

Gustav A. Peterson, St. Paul

Leo Leonard Ament, West St. Paul

Gunnard F. Nelson, St. Paul

John J. O'Connell, St. Paul

Edward J. Schoch, St. Paul

Willard W. Baker, South St. Paul

David Gutsche, St. Paul

Edward Anthony Murray, St. Paul

Erick R. Kempe, West St. Paul

Mrs. F. W. Benjamin, Hastings

Anthony C. Thorsen, St. Paul

Allen M. Bullock, St. Paul

Arthur Paymar, St. Paul

Kermit Bailey, South St. Paul

Mrs. Lois F. Larsen, St. Paul

Bernard V. Minea, St. Paul

George B. Muellner, St. Paul

Leonard O. Neilson, St. Paul

Leon Hayward, Pine Island

Mrs. May R. Ganfield, Hastings

H. V. E. Johnson, Cannon Falls

Lester J. Gilbert, St. Paul

Milton W. Baumann, South St. Paul

Lloyd A. Davis, South St. Paul

Adrian G. Carlson, St. Paul

Theodore H. Palmer, St. Paul

The Court: (To the Clerk) You may swear the panel.

(The jury panel was duly sworn.)

The Court: Ladies and gentlemen of the panel, as you have been told, this is the case of the United States of America vs. Thomas W. Banks. The defendant is charged in an indictment in this case, filed January 14, 1952, with what is commonly called tax evasion, in which he is charged with evading a portion of his taxes due for the years 1945, '46, and '47. Is the defendant present?

Mr. Graff: Yes, Your Honor.

The Court: He may arise.

(Mr. Banks arose.)

The Court: You may be seated. The defendant has arisen in the court room. The defendant is represented

by Mr. John W. Graff, sitting at the counsel table almost opposite me, by Mr. Richard Kyle, and Mr. Jerome Hoffmann, the three lawyers sitting along counsel table in a row to the left of the defendant.

The United States is represented by Mr. C. U. Landrum, and Mr. Miles W. Lord sitting at his left. Mr. Landrum sits almost across the counsel table from me; and Mr. Richard Buhrman. Mr. Philip Neville is the United States Attorney for the State of Minnesota. He will not be in the active trial of this case?

Mr. Landrum: I think not, Your Honor.

The Court: Very well. He isn't present at this time.

(To the jury panel.) Do any of you know the defendant, the gentleman who arose in the court room a moment ago? If so, raise your hands.

(No response.)

Do you know Mr. Graff, who sits at the counsel table? If so, raise your hands.

(No response.)

Do you know Mr. Hoffmann, who sits next to Mr. Graff at the counsel table? If so, raise your hands.

(No response.)

Do you know Mr. Richard Kyle, who practices law here in St. Paul—well, all three of these lawyers practice in St. Paul. Are you acquainted with Mr. Kyle?
If so, raise your hands.

(No response.)

Are any of you acquainted with Mr. C. U. Landrum? If so, raise your hands.

(No response.)

BLEED THROUGH

Are you acquainted with Mr. Lord, Assistant United States Attorney for Minnesota?

(No response.)

Are you acquainted with Mr. Philip Neville, the United States Attorney for the State of Minnesota? If so, raise your hands.

(No response.)

How many of you have heard about this case? Raise your hands.

(Approximately fifteen hands raised.)

How many have talked to anybody about this case at any time in the past?

(One hand raised.)

By the Court:

Q. What is your name?

A. Bernard V. Minea.

Q. Have you talked to anybody who claimed to know anything about the facts in this case?

A. No, Your Honor, I have not.

Q. You have just visited with other citizens about it?

A. Just from seeing newspaper comments, and things of that type,—just general conservation.

Q. You have read about it in the newspaper?

A. That is all.

Q. Have you expressed an opinion to anyone about whether this defendant was innocent or guilty?

A. I have not.

Q. No one has expressed that sort of an opinion to you about this case?

A. No, they have not.

Q. You have no opinion at this time as to whether he is guilty or innocent?

A. None, Your Honor.

POOR COPY

Q. You did not form an opinion from what you read in the newspapers or what you have heard about it?

A. None at all.

Q. You feel that you are free, so far as your information is concerned, to serve on this jury, hear the evidence and the instructions of the Court, and decide this case fairly and impartially between the parties?

A. Yes, Your Honor.

Q. When you held up your hand, you meant that you read about the case, or that you had heard about it on the radio—

A. Well, the firm I am employed by, we had a summons, or whatever you might call it, for testimony in this trial,—or some of our records, rather.

Q. Some of your records?

A. Yes, sir.

Q. You have not been called as a witness, of course?

A. No, Your Honor.

Q. What firm are you with?

A. First National Bank, St. Paul.

Q. Some of the officers or employees of your bank have been called here as a witness in this case?

A. Yes, Your Honor.

Q. That is because of their connection with the banking business?

A. That is right.

Q. Their familiarity with what the records of the bank show?

A. That is right.

Q. The fact that they appear in this case would not influence you if you were serving on this jury?

A. Not at all.

The Court: (To the jury panel) I think I stated to you that three lawyers representing the defendant in this case are attorneys of St. Paul. Have they ever represented any of you? Is there any member of this panel who has

ever been represented in legal matters by Mr. Graff, Mr. Hoffmann, or Mr. Kyle? If so, raise your hand.

(No response.)

I might have concluded that because none of you seem to be acquainted, personally acquainted with these lawyers. But I wanted you to to tell me whether or not these lawyers have ever represented any of you in any manner. I think I asked you if you knew this defendant and none of you raised your hand.

I just want to say that I am not asking these questions to pry into your business or into your affairs in any way. I am simply asking these questions so that counsel for the respective parties in this case may know something of your experience in life and in business affairs in this country, so that they may judge in a measure whether or not you are unbiased, unprejudiced citizens, and qualified in every respect to serve on this jury. These parties are both entitled to men and women of honor and integrity, who are unbiased and unprejudiced and qualified in every respect to serve on this jury.

I shall ask you a number of questions generally. I think these questions properly may be presented. You will listen to them and undertake to make careful answers.

Has any member of your family ever been employed by the United States, or any agency or instrumentality thereof? If any of you have a member of your family employed by the United States—

Juror Gilbert: Not at the present time, Your Honor.

The Court: Not at the present time?

Juror Gilbert: No, sir.

The Court: Your name and address?

Juror Gilbert: Lester J. Gilbert, 518 South Saratoga.

The Court: A member of your family was employed by the United States?

Juror Gilbert: That is right,—Post Office Department.

The Court: He is not now?

Juror Gilbert: No, sir.

The Court: No member of your family is employed by the United States at this time?

Juror Gilbert: Not at this time.

The Court: How long was he employed in the Postal Department?

Juror Gilbert: Oh, he did temporary duty of about two months, I would say,—something like that.

The Court: How long ago has that been?

Juror Gilbert: A year ago.

The Court: Would that influence you in this case?

Juror Gilbert: No, sir.

The Court: You may be seated.

Juror Minea: Would the fact that I have a son in the armed forces—would that be employed by the Government?

The Court: You have a son in the armed forces?

Juror Minea: Yes, Your Honor.

The Court: Where is he now serving?

Juror Minea: He is in the Presideo, San Francisco.

The Court: How long has he been in the service?

Juror Minea: Oh, about fifteen months.

The Court: Has he been abroad during that time?

Juror Minea: No, he has not.

The Court: What department of the service is your son in?

Juror Minea: In the military police.

The Court: What is his age now?

Juror Minea: 22.

The Court: Is there any other member of your family in the Government service in any way?

Juror Minea: Not now. I had another son who was in the last war.

The Court: He is not now in the military forces of this country?

The Court: Would the fact that you have a son serving in the military forces of the country at this time influence you in this case?

Juror Minea: Not at all.

The Court: You feel you could hear the evidence and decide this case fairly and impartially between these parties?

Juror Minea: Yes, I can.

The Court: (To the juror Larsen) You are holding your hand up?

Juror Larsen: I have two sons in the United States Army.

The Court: Where are they?

Juror Larsen: I have one in the Air Force in Texas, Fort Worth, and one at Fort Benning, Georgia.

The Court: Your name and address?

Juror Larsen: Mrs. Lois F. Larsen.

The Court: They are young men?

Juror Larsen: Yes,—21 and 20.

The Court: Would that influence you in this case?

Juror Larsen: No, sir.

The Court: You can hear this evidence, the instructions of the Court, and decide this case fairly between these parties?

Juror Larsen: Yes, sir.

Juror Ganfield: Your Honor, I have a son in the Navy.

The Court: How long has he been in the Navy?

Juror Ganfield: Since last January. In World War II he served twelve months also in the Navy.

The Court: He had served twelve months already?

Juror Ganfield: Yes.

The Court: Where is he now?

Juror Ganfield: At San Diego, in the Naval Base.

The Court: That is the only member of your family in the Government service in any way?

Juror Ganfield: At present. Another son served in World War II also.

The Court: He is not in the Army now?

Juror Ganfield: Not at the present time, no.

The Court: Where is he?

Juror Ganfield: He is employed in St. Paul now. He is not now in the service.

The Court: I see. Would the fact that you have a son in service and had another son in the service during the Second World War influence you in this case?

Juror Ganfield: I do not feel so.

The Court: You feel you can hear the evidence in this

case and decide it fairly and impartially between the parties?

Juror Ganfield: I do.

Juror Baker: I understood your first question, Your Honor, to be—Had you ever, had any of your relatives ever been employed in the Government service? My father was in the Government service in the Department of Agriculture. He is retired and deceased.

The Court: He is not now living?

Juror Baker: No.

The Court: Where was he stationed?

Juror Baker: About a year and a half all over the country, but the last station was here in South St. Paul. He transferred around quite often.

The Court: Your name is—

Juror Baker: W. W. Baker.

The Court: That is the only member of your family who has been employed by the United States?

Juror Baker: Yes.

The Court: And he was in the Agricultural Department, as I understood you?

Juror Baker: Yes.

The Court: For a period of time?

Juror Baker: Yes, sir—35 or 40 years.

The Court: I see. Well, you are not employed by the Government?

Juror Baker: No, sir.

The Court: You never have been?

Juror Baker: No.

The Court: Would the fact that your father was employed by the Government influence you in this case?

Juror Baker: Not in the least.

(Juror David Gutsche holds up hand.)

The Court: What is your name and address, please?

Juror Gutsche: David Gutsche.

The Court: Where do you live?

Juror Gutsche: St. Paul,—1011 Margaret Street. I had two sons in the war the last time—

The Court: But not at the present time?

Juror Gutsche: No, —when the war quit they come home.

The Court: Would that influence you in this case?

Juror Gutsche: No, not at all, Your Honor.

The Court: You can hear the evidence and decide fairly and impartially between these parties, can you?

Juror Gutsche: That is right.

The Court: You have no sons in the service now?

Juror Gutsche: No.

The Court: Is any member of your family engaged in law enforcement work?

Juror Gutsche: No.

The Court: (To the jury panel) I am asking that question of all of you. That is a general question. Are you engaged in law enforcement work?

(No response.)

Are any of you engaged in law enforcement work like employment in the Federal Bureau of Investigation, or the

Alcohol Tax Unit? Once upon a time it was in the prohibition service. Now, have you ever been or are you now engaged in law enforcement work?—that is the question. If so, raise your hand.

(No response.)

Are you now or have you ever been employed by any state, or any agency or instrumentality of any state? If so, raise your hand.

(No response.)

Are you personally acquainted with any person employed by the Bureau of Internal Revenue?

(Two hands were raised.)

The Court: What is your name and address?

Juror Bailey: Kermit Bailey, 708 Marie Avenue, South St. Paul.

The Court: Who do you know who is employed at the Interanl Revenue Department?

Juror Bailey: Wallace Benson. He is a Collector of Internal Revenue.

The Court: How long have you known him?

Juror Bailey: Fifteen years, approximately.

The Court: You just met him in connection with his duties—

Juror Bailey: (Interposing) I consider him a personal friend of mine. I worked with him at one time before he went into the service.

The Court: Well, would the fact that he works for the Internal Revenue and you know him and consider him your personal friend, —would that influence you in this case?

Juror Bailey: No, Your Honor.

The Court: It wouldn't be embarrassing to you to return a verdict against a defendant charged with a violation of the revenue laws if you believed it to be proper?

Juror Bailey: No, Your Honor.

The Court: (To juror Minea) Now, you held up your hand?

Juror Minea: I know George Anderson down at the Internal Revenue Department and also Gerry, the cashier, down there.

The Court: Would that influence you in this case?

Juror Minea: Not at all.

The Court: You would not be inclined to favor the Government in this case because this gentleman in the Internal Revenue Department is an acquaintance of yours?

Jurior Minea: No, I would not.

The Court: Is he just an acquaintance or would you call it a warm friendship existing between you?

Juror Minea: Well, I have known George Anderson for thirty years or more, been a friend of his, —nothing recent at all.

The Court: Nothing recent?

Juror Minea: I see him, but that is all.

The Court: You have known him for all these years but you are not related in any way?

Jurior Minea: Not at all.

The Court: Would your acquaintanceship with him enter into your consideration of this case if you were selected on this jury?

Juror Minea: Not a bit.

The Court: (To the jury panel) Are you personally

acquainted with any person engaged in investigatorial work for the United States or any state government? If so, raise your hand.

(Juror Allen N. Bullock raises hand.)

The Court: Your name?

Juror Bullock: My name is Bullock, —A. N. Bullock, 262 Marshall. I know a gentleman with the FBI.

The Court: How long have you known him?

Juror Bullock: About five years, sir.

The Court: Where is he stationed?

Juror Bullock: He is in the Twin Cities.

The Court: Connected with the Twin City offices?

Juror Bullock: Yes, sir.

The Court: He is not related to you?

Juror Bullock: No, sir.

The Court: Is it just an acquaintanceship, or is it a friendship that exists between you?

Juror Bullock: Well, he and his family own the apartment in which we live,—own the building.

The Court: Sort of a business contact, is it?

Juror Bullock: Not particularly business, no, sir,—more social than business.

The Court: You know him, then?

Juror Bullock: Yes, sir.

The Court: You have for five years?

Juror Bullock: Yes, sir.

The Court: Would that influence you in this case?

Juror Bullock: No, sir, it would not.

The Court: You could hear the evidence and decide this case fairly between the parties, irrespective of your acquaintanceship or friendship with this party?

Juror Bullock: I could, yes, sir.

The Court: Is there anyone else?

Juror Minea: Your Honor, I know John McGowan, the United States Marshal. Was that the question that you asked, —along that line?

The Court: Well, are you personally acquainted with any person engaged in investigatorial work for the United States, or any state government? That is the question.

Well, your acquaintanceship with Mr. McGowan, the fact that he is the United States Marshal, would that influence you in this case?

Juror Minea: Not at all.

The Court: Now, there was some other—

Juror Murray: (Interposing) I know John McGowan.

The Court: Your name is—

Juror Murray: Edward Murray.

The Court: Yes. How long have you known Mr. McGowan?

Juror Murray: About ten years.

The Court: He is a personal friend of yours?

Juror Murray: No.

The Court: Just an acquaintanceship?

Juror Murray: Yes.

The Court: Would that influence you in this case?

Juror Murray: No, not at all.

The Court: (To the jury panel) Are you acquainted with any of the persons employed in the United States Attorney's office in St. Paul? If so, raise your hand?

(No response.)

Have any of the attorneys in that office ever represented you, or the members of your family, or your employers in any professional capacity? If so, raise your hand.

(No response.)

Are you personally acquainted with George McKusick of the Bureau of Internal Revenue? If so, raise your hands.

(No response.)

Are you acquainted with Agent Kleven of the Internal Revenue Department?

(No response.)

Are you acquainted with Arthur B. Stone of the Bureau of Internal Revenue? If so, raise your hand.

(No response.)

Have you ever been a member of any State or Federal Grand Jury? If so, raise your hand.

(One hand raised.)

The Court: I see just the one hand. And what is your name?

Jurea Rea: Charles Rea. In 1946 I was on the Federal Grand Jury.

The Court: In 1946?

Juror Rea: Yes.

The Court: You were on the Federal Grand Jury here in St. Paul?

Juror Rea: Yes, sir.

The Court: Is that the only time you were ever on a Federal Grand Jury?

Juror Rea: That is, yes, sir.

The Court: That was about six years ago?

Juror Rea: Six years ago,—1946.

The Court: How long did you serve?

Juror Rea: I forget now whether it was two or three sessions.

The Court: Two or three different sessions?

Juror Rea: Yes, sir.

The Court: Would that influence you in this case?

Juror Rea: No, sir.

(Juror David Gutsche raises hand.)

The Court: Now, your name again?

Juror Gutsche: David Gutsche. I was on the jury the same time as Mr. Rea was.

The Court: You served on the Grand Jury?

Juror Gutsche: The same time Rea was.

The Court: Is that the only time you ever served on a Grand Jury?

Juror Gutsche: I was once before but I forget what year it was. It was before this last one.

The Court: Was it in this court?

Juror Gutsche: It was in—

The Court: Was it in the State Court?

Juror Gutsche: Yes, but this last time I was on the same jury with Mr. Rea.

The Court: Well, that was in the Federal Court, as I understand you, Mr. Rea?

Juror Rea: Yes, sir.

Juror Gutsche: That is where I was in '46.

The Court: You just served the one time on the Federal Grand Jury, did you, Mr. Rea?

Juror Rea: Yes, just on the one panel. It was three different sessions, I believe.

The Court: Do you remember this juror serving with you on that Grand Jury?

Juror Rea: Yes, sir.

The Court: Very well. (To the jury panel) Have you ever served on a petit jury in any state court? If so, raise your hand.

(Approximately ten hands were raised.)

The Court: I think I will not make further inquiry at this time about that. How many have served on the petit jury in this court, the Federal Court, before? Raise your hands.

(Four hands were raised.)

The Court: I see four hands. Now, how many have served on a petit jury in the State Court,—the State District Court? Raise your hands again, all of you who have served in the State District Court on a petit jury.

(Six hands were raised.)

The Court: Half a dozen. Have you ever served on the trial of a criminal case? If so, raise your hand?

(Three hands were raised.)

The Court: Your name is—

Juror Bailey: Kermit Bailey, 708 Marie Avenue, South St. Paul.

The Court: You served on a jury in a criminal case?

Juror Bailey: Yes, Your Honor.

The Court: In the Federal Court or State Court?

Juror Bailey: Federal Court.

The Court: In the Federal Court?

Juror Bailey: Yes, Your Honor. I don't remember whether it was '46 or '47,—it was shortly after I got out of the service.

The Court: You served in this court, did you?

Juror Bailey: Judge Donovan's, I believe.

The Court: Judge Donovan held the court?

Juror Bailey: Yes, Your Honor.

The Court: Yes, but you served in it?

Juror Bailey: Yes, sir.

The Court: That has been five or six years ago?

Juror Bailey: Yes, Your Honor. I don't remember the exact date.

The Court: Do you remember the case you served on?

Juror Bailey: Yes, it was a White Slave case.

The Court: I see. Is that the only criminal case you ever served on in this court?

Juror Bailey: Yes, Your Honor.

The Court: Now, you served—

Juror Minea: (Interposing) The criminal case I served on was in the Ramsey County District Court.

The Court: Just the one case?

Juror Minea: One criminal case, Your Honor.

The Court: How long ago has that been?

Juror Minea: About twenty years ago.

The Court: You haven't served within that time?

Juror Minea: Not on a criminal case.

The Court: Has anyone else served on a criminal case?

Juror Baumann: The District Court in Goodhue County.

The Court: The District Court in Goodhue County?

Juror Baumann: That is right.

The Court: You served on a criminal case?

Juror Baumann: That is right.

The Court: How long ago has that been?

Juror Baumann: About fifteen years ago.

The Court: And your name, for the benefit of counsel—

Juror Baumann: Milton Baumann is the name.

The Court: Is there anyone else?

(No response.)

The Court: Mr. Baumann, how long ago has it been since you served on that jury?

Juror Baumann: Fifteen years.

The Court: Fifteen years. (To the jury panel) How many have served on any jury within the last five years? Raise your hands.

(Four hands were raised.)

The Court: Now, would the fact that this criminal pros-

ecution is brought in the name of the United States in and of itself, standing alone, create any prejudice or bias which would prevent you from being a fair and impartial juror? If so, raise your hand.

(No response.)

This defendant is presumed to be innocent until he is proved guilty by evidence which convinces you beyond a reasonable doubt of his guilt. Is there anyone on this panel who for any reason would not give the defendant the benefit of the presumption of innocence and require the Government to prove him guilty beyond a reasonable doubt before agreeing to a verdict of guilty? If so, raise your hand.

(No response.)

Is there any member of this panel who is of the opinion that you would not feel justified in finding a person guilty under any circumstances, even though you believed beyond a reasonable doubt that the defendant was guilty,—in the trial of the case you would not feel you could join in a verdict finding such person guilty? If anyone has that opinion, it would be as extreme as refusing to give the defendant the benefit of the presumption of innocence. If you have that opinion, raise your hand.

(No response.)

In other words, if you believed this defendant from the evidence in the case guilty beyond a reasonable doubt, it is the duty of the jurors courageously to say so by a verdict of guilty; on the other hand, if you are not convinced beyond a reasonable doubt that he is guilty, it is your duty courageously to say so by a verdict of not guilty.

By the Court:

Q. Mrs. Alice F. Pfeiffer, you live in St. Paul?
A. Yes, sir.

Q. Now, speak so I can hear you. It is difficult to hear in this room. What is your residence address?

A. 2351 Chilcombe Avenue.

Q. How long have you lived in St. Paul?

A. All my life.

Q. Are you in business or are you employed in any way?

A. No.

Q. You keep the home?

A. Yes.

Q. Are you married?

A. Yes.

Q. Do you have any children?

A. Yes.

Q. How many children?

A. One.

Q. There is no illness in your family?

A. You mean at the present time?

Q. I mean serious illness at the present time?

A. No, Your Honor.

Q. You have served on juries before?

A. No, Your Honor, but I received a jury summons for, I think, the District Court of the County for May 12th past and I asked to have it deferred because I had to be out of town at that time. It has been deferred but I will be called in June. I don't know whether that is of any interest to you or not. I mean, is there a possibility that this case might run into that summons?

Q. Oh, I would guess not, although that would be speculation.

A. And would I really have to serve twice in succession like that if—

Q. No, I think if you serve in this court for a substantial period of time, the State Court will excuse you.

A. (Continuing) You see, I received that summons first, Your Honor.

Q. Yes.

A. (Continuing) And was excused until June,—or deferred until June before I got this summons.

Q. Well, you can telephone the Judge in charge down there that you are serving on this jury and you will be excused. There is no question about that, I am sure. You have not heard about this case?

A. No. I have read something about it in the newspapers, of course.

Q. You have read something about it in the papers?

A. Surely.

Q. What papers do you read?

A. The Minneapolis Tribune and the St. Paul Dispatch.

Q. You have read about this case in those newspapers?

A. Yes, sir.

Q. From what you have read, have you formed any opinion as to the guilt or innocence of this defendant?

A. No, sir.

Q. It was just newspaper material, so far as you were concerned?

A. That is right.

Q. You feel that you can hear the evidence in this case and the instructions of the Court and join in a fair and impartial verdict in this case?

A. That is right.

Q. Do you know of any reason why you can't do that?

A. No.

Q. No one has talked to you about this case?

A. No.

Q. No one who claimed to know the facts about it has told you about it at any time?

A. No.

Q. Have you served on a jury in Federal Court before?

A. No.

Q. This is the first time you have ever been employed on a petit jury?

A. Yes.

Q. You have never served on a grand jury?

A. No.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. No.

Q. (To Juror Rea) Charles Rea, you live at Red Wing?

A. Yes, sir.

Q. How long have you lived there?

A. Fifteen years, Your Honor.

Q. Your occupation?

A. I am in the sign business.

Q. And you have been for about 25 years?

A. That is right, sir.

Q. You are married and have—

A. (Interposing) Two children.

Q. Two children?

A. Yes.

Q. You have served on juries before?

A. Just the grand jury.

Q. The grand jury in this court?

A. In this court.

Q. Have you ever served on a grand jury or a petit jury in the State Court?

A. No, Your Honor.

Q. You have read about this case in the newspapers?

A. No, I am afraid not. All I know of it I have heard on the radio.

Q. Do you not remember of reading anything about it, anyway?

A. I haven't paid any attention. I haven't been interested in it.

Q. Did I understand that you haven't heard about it on the radio?

A. I have heard of it on the radio, but that is all.

Q. You have heard of it on the radio?

A. I haven't read anything in the paper about it.

Q. Have you talked to anybody who claimed to know anything about it?

A. No.

Q. You have not discussed it with anyone? A. No.

Q. Well, from what you have heard about it, have you formed any opinion as to whether this man is guilty or innocent?

A. No, I haven't.

Q. You have no opinion at this time one way or the other?

A. None whatever.

Q. You have lived in Red Wing all this 25-year period?

A. No, 15 years. I lived in Minneapolis previous to that.

Q. I see. How long did you live in Minneapolis?

A. 15 years.

Q. And that was up to about 15 years ago?

A. That was up to 1936,—the fall of '36.

Q. You do not know any of these parties whom I have mentioned, the lawyers for the defendant or anyone connected with this case?

A. No, Your Honor.

Q. These Internal Revenue employees or officers, you are not acquainted with any of them?

A. No.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. No, I don't.

To Juror Alice F. Pfeiffer:

Q. (By the Court) Mrs. Pfeiffer, I neglected to ask you what your husband's occupation is?

A. He is a Professor at the University of Minnesota.

Q. What department does he serve in over there?

A. The German Department.

Q. He speaks German, reads and writes the German language?

A. That is right.

Q. How long has he been at the University?

A. 22 years, I believe.

Q. That is his business, is it, exclusively—that is, acting as Professor at the University of Minnesota?

A. That is right.

Q. And he has been acting there for about twenty years?

A. 22, I think.

Q. 22 years? A. Yes.

To Juror Gustav A. Peterson:

Q. (By the Court) Gustav A. Peterson, you live in St. Paul?

A. Yes, sir.

Q. How long have you lived there?

A. As long as I have lived.

Q. All your life? A. Yes.

Q. What is your residence address? A. 1240 Asuland.

Q. What is your occupation? A. Sheet metal worker.

Q. Are you with one of the companies here in town?

A. Yes, sir, with Axel Newman Heating & Plumbing.

Q. How long have you been with that concern?

A. I have only been with that concern since the first of the year.

Q. What concern were you with before that?

A. Neil & Hubbard.

Q. How long were you with that company?

A. Two years.

Q. What business were you connected with before that?

A. Stewart Sheet Metal.

Q. You were still in the sheet metal business?

A. Yes, sir.

Q. You are married and have a family?

A. Yes, sir,—three daughters.

Q. Are they at home?

A. Two are married and one is home.

Q. Did you ever serve on a jury in this court before?

A. Not in this court.

Q. You have in the State Court?

A. Yes, sir, three times.

Q. Have you heard about this case? A. No, sir.

Q. You haven't been reading about it?

A. No—I heard my wife make mention of it one day but I didn't pay much attention. I was reading something else at the time.

Q. You were interested in something else?

A. That is right.

Q. You didn't find out anything about this case then?

A. No, I didn't.

Q. You have no opinion about it one way or the other at this time?

A. No, sir.

Q. Did you ever serve on a criminal jury,—a jury that tried a criminal case?

A. No, sir.

Q. You have served on civil cases? A. That is right.

Q. In the State Court? A. Yes, Your Honor.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. No, Your Honor.

Q. You do not know any of these parties, the lawyers or the defendant?

A. No, sir.

Q. Do you know any of the Internal Revenue employees or agents whom I have mentioned in this case?

A. No, sir.

Q. Have you had any difficulty with the Government at any time in the past in tax matters?

A. No, sir.

Q. You said you were a sheet metal worker?

A. Yes, sir, with the Axel Newman Plumbing & Heating at present.

Q. They are here in St. Paul?

A. Yes, sir,—up on Como Avenue across from the Fair Grounds.

To Juror Charles Rea:

Q. (By the Court) Mr. Rea, were there tax cases presented to the Grand Jury while you were serving on the Grand Jury?

A. Yes.

Q. There were tax cases presented at that time?

A. Yes, sir.

Q. Some indictments were returned at that time?

A. Yes, sir.

Q. Do you remember how many?

A. That I don't, no.

Q. You do not remember how many?

A. I don't remember how many.

Q. Or the cases in which indictments were returned?

A. I believe one was a dentist here or a doctor in Minneapolis—I don't recall the name now.

Q. That is about as much as you remember about it at this time, after five or six years, I suppose?

A. Well, we had some other cases that I have a better memory of than that. I believe that you could say they were more interesting.

Q. Very well; we will not go into too many of those at this time.

To Juror Leo Leonard Ament:

Q. (By the Court) Leo Leonard Ament?

A. Yes, Your Honor.

Q. You live in West St. Paul? A. For twelve years.

Q. What is your street address?

A. 1173 Charlton Street.

Q. How long have you lived in St. Paul, or West St. Paul?

A. All my life.

Q. I beg your pardon?

A. In St. Paul and West St. Paul all my life.

Q. What is your occupation?

A. I work for Farwell, Ozmun, Kirk Company.

Q. How long have you been with that company?

A. 22 years.

Q. What is your work? A. Stock supervisor.

Q. That is in their St. Paul place of business? A. Yes.

Q. You are married and have a family?

A. Yes, Your Honor, three children.

Q. Have you ever served on a jury in this court before?

A. Five years ago,—five or six years.

Q. Did you serve on any criminal cases?

A. No, I have not.

Q. Did you ever serve on a Grand Jury in this court?

A. No, Your Honor.

Q. Have you ever served in the State Courts? A. No.

Q. Have you heard about this case in any way?

A. Never paid no attention to it.

Q. You have no information about it at this time?

A. No, Your Honor.

Q. You have never talked to anybody about it? A. No.

Q. No one ever told you about it who claimed to know the facts about it?

A. No, Your Honor.

Q. Do you know any of the parties connected with this case?

A. No, I do not.

Q. Or the employees or agents of the Internal Revenue office?

A. No, I do not.

Q. Have you ever had any difficulty with the Government over any tax matters?

A. No, I haven't.

Q. Or the State? A. No.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. No, I don't.

To Juror Gunnard F. Nelson:

Q. (By the Court) Mr. Nelson— A. Yes, sir.

Q. You live in St. Paul? A. All my life.

Q. You have lived here all of your life?

A. That is right.

Q. What is your occupation?

A. Chief rate clerk, Passenger Traffic Department, Great Northern Railroad.

Q. How long have you been with the Great Northern?

A. Forty years.

Q. Do you know any of the parties connected with this case?

A. No, sir.

Q. Have you heard about it in any way? A. No, sir.

Q. You have not read about it in the newspapers?

A. No, sir.

Q. You have never talked to anyone who claimed to know the facts in the case?

A. No, sir.

Q. And you have not discussed it with anybody at any time?

A. No, Your Honor.

Q. You do not know any of the attorneys? A. No, sir.

Q. Have you served on a jury in this court before?

A. No, sir.

Q. Have you in the State Courts? A. No, sir.

Q. You are married? A. Yes, sir.

Q. Do you have a family? A. Two children.

Q. What is your residence address?

A. 777 East Cottage Avenue.

Q. Do you know any of the officers or employees of the Internal Revenue Department?

A. No, Your Honor.

Q. Now, what is the nature of your work for the Railroad Company?

A. Figuring passenger fares—chief rate clerk.

Q. Chief rate clerk? A. That is right.

Q. And you have been doing that for how many years?

A. Well, I have been with the company forty years, but it is eighteen years now that I have served in that capacity.

Q. That you have been serving as the rate calculator?

A. Yes, sir.

To Juror John J. O'Connell:

Q. (By the Court) Mr. John J. O'Connell, you live in St. Paul?

A. Yes, sir.

Q. How long have you lived here? A. All my life.

Q. What is your occupation?

A. I am treasurer, St. Paul Union Stockyard Company.

Q. How long have you been with the St. Paul Union Stockyard Company?

A. 35 years.

Q. You are married and have a family? A. Three boys.

Q. Are they at home? A. One.

Q. The other two are married? A. Married.

Q. Have you heard about this case in any way?

A. Just on the radio. I have heard it mentioned on the radio. I haven't paid any attention to it.

Q. Did you form any opinion as to whether this defendant was guilty or innocent from what you heard?

A. No, Your Honor.

Q. You know nothing about the case except what you have heard on the radio?

A. That is right.

Q. You have not discussed the case with anyone?

A. No.

Q. No one who claimed to know the facts has told you about the case in any way?

A. No, Your Honor.

Q. No one has talked to you about this case? A. No.

Q. Have you served on juries before in this court?

A. Not in this court.

Q. Have you in the State Court? A. Ramsey County.

Q. Ramsey County District Court? A. Yes.

Q. Do you know any of the parties connected with this case?

A. No, Your Honor.

Q. Do you know any of the officers or employees in the Internal Revenue office?

A. No.

Q. Have you had any tax difficulties with the Federal Government at any time in the past?

A. No.

Q. Or the State Government? A. No.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. No, Your Honor.

To Juror Edward J. Schoch:

Q. (By the Court) Mr. Edward J. Schoch, you live in St. Paul?

A. Yes, sir.

Q. How long have you lived here? A. All my life.

Q. What is your residence address?

A. 251 North County Line.

Q. You are married and have a family? A. Yes, sir.

Q. What is your occupation? A. Grocery business.

Q. You belong to the store that has been in existence for many years in St. Paul?

A. Yes, sir.

Q. The grocery business? A. Yes, sir.

Q. What is the location of your business?

A. Seventh and Broadway.

Q. You are one of the brothers, or a member of the family anyway?

A. Yes, sir.

Q. That conducts that business down there? A. Yes.

Q. How long have you been in the business, Mr. Schoch?

A. That was established in 1858.

Q. Well, that was before your time— A. Yes.

Q. Now, you are married? A. Yes, sir.

Q. Have you heard about this case in any way?

A. No,—I have read a little bit about it in the papers.

Q. Did you form any opinion from what you read about it?

A. No.

Q. You have no opinion one way or the other at this time?

A. No.

Q. Do you know any of these parties? A. No, sir.

Q. The lawyers, or the defendant, or anyone connected with the case?

A. No, sir.

Q. Or any of the agents of the Internal Revenue office?

A. No, sir.

Q. Have you had any tax difficulties with the Federal Government at any time?

A. Oh, I wouldn't say difficulties. I have called up there.

Q. You have had to make out reports? A. That is right.

Q. And you have had to pay taxes? A. That is right.

Q. You haven't had any difficulty other than that?

A. That is all.

Q. Like a great many citizens? A. That is right.

Q. Well, have you had any trouble with the State of Minnesota?

A. No, sir. I haven't paid quite so much to the State perhaps.

Q. You have not heard about this case? A. No.

Q. No one has talked to you about it in any way?

A. No, sir.

Q. You have no opinion one way or the other at this time?

A. No, sir.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. No, sir.

To Juror Willard W. Baker:

Q. (By the Court) Willard W. Baker, you live in South St. Paul?

A. Yes.

Q. How long have you lived there?

A. About four years, sir. But that is one of those things we get our mail from South St. Paul and we live in West St. Paul, so to be correct I live in West St. Paul.

Q. How long have you lived there, did you say?

A. About four years, sir.

Q. Where did you live before that? A. In St. Paul.

Q. How long did you live in St. Paul?

A. Oh, about thirty years.

Q. You are married and have a family? A. Yes.

Q. What is your occupation? A. Steam fitter.

Q. With whom are you—

A. (Interposing) Armour & Company.

Q. How long have you been with that company?

A. Fifteen years.

Q. Have you heard about this case in any way?

A. I read the headlines in the Sunday paper.

Q. Have you any opinion one way or the other at this time?

A. No, sir.

Q. Have you served on juries before? A. Yes, sir.

Q. In this court? A. No, sir.

Q. In the State Court? A. Yes, sir.

Q. Have you served on criminal cases, have you?

A. No, sir.

Q. Have you heard about this case in any way except what you said you read in the newspapers?

A. In the headlines Sunday, yes, sir.

Q. That is all. You didn't hear about it over the radio?
A. No, sir,—I have a farm, too, sir.
Q. Have you had any tax trouble at any time in the past?
A. No, sir.
Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?
A. No, sir.

To Juror David Gutsche:

Q. (By the Court) Mr. Gutsche, you live in St. Paul?
A. Yes, sir, Your Honor.
Q. How long have you lived here? A. Since 1913.
Q. What is your occupation?
A. Interior painter and decorator.
Q. How long have you been in that business?
A. Since 1913.
Q. Ever since you have lived here, then?
A. That is right.
Q. You are married? A. Married.
Q. Do you have a family?
A. Two daughters and two sons. One daughter is home yet.
Q. Are they grown up yet?
A. Yes,—three of them married and one home yet. One girl is home.
Q. Did you ever serve on a jury in this court before?
A. No, except about six years ago on the other side—
Q. Yes, on the Grand Jury? A. Yes.
Q. Well, have you served in the State Court?
A. Once, but I was excused at that time.
Q. What is your business?
A. Interior painter and decorator.
Q. Interior painter and decorator? A. That is right.
Q. Very well. Were you born in this country?
A. No, born in Old Country.
Q. What country? A. Russia.

Q. Russia? A. Yes.

Q. How old were you when you came over?

A. Oh, about—I was young—I was around 19 years, I believe.

Q. 18 or 19 years? A. Yes.

Q. Well, you ought to be a right good citizen by this time.

A. Yes, I have got my citizen papers.

Q. Your children went to school here in the public schools of this country?

A. Yes, that is right. I got my citizen papers.

Q. You are a citizen, are you? A. Yes.

Q. Have you had any tax matters with the Government?

A. No, sir, Your Honor.

Q. Or with the State? A. No, sir, Your Honor.

Q. Have you heard about this case at any time?

A. No, I never paid much attention.

Q. You have no opinion one way or the other now?

A. No, sir, Your Honor.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. No, sir, Your Honor.

Q. I say, do you know of any reason why you can't do that?

A. No.

To Juror Willard W. Baker:

Q. (By the Court) I must have overlooked where you live. You said you lived in West St. Paul?

A. Yes.

Q. What is your street address? A. 453 Thompson.

Q. I think that is the thing that is desired. It is 453 Thompson?

A. Yes. To clarify that, I might say that we have a rural route there and West St. Paul hasn't a post office and they get theirs on route 7 from St. Paul and our district gets it from South St. Paul.

Q. I think that street address will serve the purpose.

To Juror Edward Anthony Murray:

Q. (By the Court) Mr. Edward Anthony Murray, where do you live?

A. 1035 North Oxford, St. Paul.

Q. How long have you lived in St. Paul?

A. 29 years, sir.

Q. What is your occupation?

A. I am working in advertising, Brown & Bigelow, in the letter department.

Q. Are you working with some company? A. Yes.

Q. In the advertising business, did I understand?

A. Yes, sir.

Q. What company are you with? A. Brown & Bigelow.

Q. What is the nature of your work with that company?

A. Well, I am supervising a group of people there in the sealing of billfolds and plastic billfolds,—working on lettering.

Q. How long have you been doing that?

A. 27 years.

Q. Are you married?

A. Yes, sir.

Q. How long have you been with Brown & Bigelow?

A. 27 years.

Q. Do you have any children? A. Three.

Q. Have you had any tax difficulty with the United States?

A. No.

Q. Or the State of Minnesota? A. No.

Q. Have you heard about this case in any way?

A. Merely read, I guess, in the headlines in the papers where there was to be some trial.

Q. Have you any opinion at this time one way or the other from what you have heard or read?

A. No, I haven't.

Q. Have you ever served on a jury in this court before?

A. No.

Q. Have you in the State Court? A. Yes.

Q. How long ago? A. 1943.

Q. Was that the last time you served in the State Court?

A. Yes.

Q. You have never served on a Grand Jury?

A. No, I haven't.

Q. You haven't heard about this case—I think I asked you that.

A. Just what I read in the papers.

Q. Yes. And you didn't form any opinion from what you read?

A. No, I didn't.

Q. Has anyone ever talked to you about this case?

A. No, they haven't.

Q. Has anyone ever told you about it who claimed to know about it?

A. No, they haven't.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. No, I don't know of any reason.

To Juror Erick R. Kempe:

Q. (By the Court) Erick R. Kempe, you live in West St. Paul?

A. Yes, sir.

Q. How long have you lived there? A. 29 years.

Q. 29 years? A. Yes.

Q. What is your occupation? A. Mechanic.

Q. Who for? A. The Streetcar Company.

Q. How long have you been with the Streetcar Company?

A. 27 years.

Q. What is the nature of your work?

A. I am a steel worker.

Q. You have been doing steel work for the Streetcar Company for 27 years?

A. 27 years, yes.

Q. You handle the steel and make the things that it is necessary for the company to have, is that correct?

A. Yes—Well, we build the streetcar, everything.

Q. Yes. You are married? A. Yes, sir.

Q. How many children? A. I have three.

Q. Have you ever heard about this case?

A. No,—just what I read in the paper about it

Q. You have no opinion at this time one way or the other?

A. No.

Q. Did you ever serve on a jury in this court before?

A. Yes, sir.

Q. How long ago?

A. Oh, it was about '45—seven years ago, I think.

Q. Seven years ago?

A. Yes.

Q. Was that the only time you ever served in this court?

A. Yes.

Q. You have never had any tax troubles with the Federal Government?

A. No.

Q. Or the State Government? A. No.

Q. You make your tax returns? A. Yes.

Q. And pay your taxes? A. Yes.

Q. You do not know any of these lawyers?

A. No.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. No, Your Honor.

Q. I think I asked you—you haven't talked to anybody about this case?

A. No.

Q. No one has told you about it who claimed to know about it?

A. No.

To Juror Mrs. F. W. Benjamin:

Q. (By the Court) Mrs. F. W. Benjamin, what is your residence address?

A. 501 West Seventh Street, Hastings, Minnesota.

Q. You live down at Hastings?

A. Hastings, yes, sir.

Q. How long have you lived there? A. 23 years.

Q. Are you employed or are you in business on your own account?

A. Not at the present time.

Q. Have you been in the past?

A. Well, for the past three and a half years I have been employed in the City Clerk's Office there.

Q. The City Clerk's Office at Hastings?

A. At Hastings, yes ,sir.

Q. How long were you employed in that office?

A. Three and a half years.

Q. That was up to what time?

A. The 1st of May, just past.

Q. Were you employed anywhere before that time?

A. No, sir.

Q. What is your husand's occupation?

A. He is retired.

Q. What was his occupation when he was active?

A. For the American Telephone & Telegraph Company.

Q. What was his work with that company?

A. They have a sub-station there and he was manager of that place.

Q. He was manager of the sub-station at Hastings?

A. At Hastings.

Q. How long had he been with that company?

A. Oh, about thirty years when he retired.

Q You have not heard about this case in any way?

A. No—just read in the papers.

Q. Have you any opinion one way or the other at this time about this case?

A. I have none.

Q. You have served on juries before?

A. I have been in this court room—this is the third time, Your Honor.

Q. Have you served in the State Court?

A. No.

Q. You have never served on a grand jury?

A. No, I haven't.

Q. You have never had any tax difficulties with the State or Federal Government at any time in the past?

A. No, Your Honor.

Q. Your husband has not? A. No, Your Honor.

Q. No one has ever told you about this case?

A. No, sir.

Q. Or talked to you about it in any way?

A. No, sir.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. I believe not.

Q. You have never served on a criminal case?

A. No, I don't think so.

Q. In any court?

A. I don't think of any criminal cases that I have served on.

Q. You have served on juries in this court before—I think you said you had been here three times?

A. That is right.

Q. They were not criminal cases?

A. I just don't remember what they were. They were mostly car accidents, and so forth.

Q. Some years ago?

A. Yes, the first one was about fifteen years ago,—about ten years ago, the first time.

Q. Ten years ago?

A. And then again about five years later, and then this is the third time.

Q. You do not remember of any criminal cases that you may have served on at that time?

A. I don't think so.

Q. And you haven't served in the State Courts?

A. I haven't.

Q. I believe you said your husband was now retired?

A. Retired, that is right.

Q. And he was a great many years with the Telephone Company?

A. Right.

Q. Manager at Hastings? A. That is right.

Q. Do you have any children? A. One daughter.

Q. Is she at home—

A. She is married and has three children.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. No, I do not.

To Juror Anthony C. Thorson:

Q. (By the Court) Anthony C. Thorsen, will you stand? I can't quite see you.

A. (Juror stands.)

Q. Where do you live, Mr. Thorsen?

A. 1284 Eleanor.

Q. How long have you lived in St. Paul?

A. Oh, about 22 years.

Q. You are married and have a family?

A. Three children.

Q. What is your occupation?

A. I am a maintenance man out at Progress Pattern.

Q. At what place?

A. Progress Pattern, a foundry company.

Q. How long have you been with that company?

A. Well, about a year and a half now.

Q. Before that, what was your work?

A. Well, then I worked for Ford Motor Company.

Q. You were out there—what was it, three and a half years?

A. No, about six years out at Ford Motor.

Q. Six years out there. What kind of work did you do out there?

A. I was a metal finisher out there.

Q. Have you heard about this case in any way?

A. Well, just what I read about it in the paper.

Q. Do you have any opinion one way or the other at this time?

A. No, I don't.

Q. You feel you have not? A. Yes.

Q. You do not know any of these parties?

A. I know Mr. Hoffmann, the attorney.

Q. How long have you known him?

A. Well, I worked down in the Minnesota Building at one time and he had his office down there.

Q. Did he represent you in legal matters?

A. No, he did not.

Q. Did you call at his office?

A. No.

Q. What was your work in that building?

A There I was a fireman and watchman.

Q. How long were you there? A. Twelve years.

Q. You knew him all that time, did you?

A. Most of the time, yes.

Q. Did you know him like you know other tenants in the building.

A. Yes.

Q. About the same way? A. About the same, yes.

Q. You had no business with him at any time? A. No.

Q. Did you ever visit him in his home? A. No, I did not.

Q. And he didn't visit you in your home?

A. No.

Q. Would your acquaintanceship with him influence you in this case?

A. No, I don't believe so.

Q. You have not heard about this case—

A. Just what I saw in the paper.

Q. Except what you read in the newspapers?

A. Yes.

Q. You do not know any of these other parties?

A. No.

Q. The lawyers or the defendant?

A. No, I do not.

Q. Have you ever talked to anybody about this case?

A. No, I haven't.

Q. Has anyone ever told you anything about it?

A. No.

Q. Anyone claiming to know the facts?

A. No.

Q. All you know about this case is what you read in the newspapers?

A. That is right.

Q. And you have no opinion now one way or the other in this case?

A. No, I haven't.

Q. You have served on juries before?

A. No, I haven't.

Q. Not in this court or in the State Court?

A. No.

Q. Have you had any tax difficulties any time in the past?

A. Well, they called me up once and I had to go down there for a check, you know.

Q. They wanted to check up on certain things?

A. Right.

Q. They called you and you went down?

A. Yes, sir.

Q. And they asked you some questions, and did that end its?

A. That was all, yes.

Q. Did you ever have any trouble with the state authorities on taxes?

A. No.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. No, I don't.

Q. You may be seated.

To Juror Allen M. Bullock:

Q. (By the Court) Mr. Bullock?

A. Yes, sir.

Q. I think I can see you. A. Thank you.

Q. Your street address? A. 262 Marshall, St. Paul.

Q. How long have you lived in St. Paul?

A. Five years. I came here in the spring of '47.

Q. Where did you live before that?

A. In Missouri,—Independence, Missouri.

Q. That is Truman's town?

A. Yes, sir.

Q. How long had you lived there?

A. Well, I went through school there and left there in—I believe it was in 1924—and after my movings around, I came back there in '42 or'43, I believe it was.

Q. Then you came to St. Paul?

A. Yes, sir.

Q. What is your occupation?

A. Branch manager for the Curtis Circulation Company.

Q. How long have you been with the Curtis people?

A. 29 years in St. Paul.

Q. You are married and have a family?

A. I do, yes. I have a son that is married and away from home.

Q. Yes. Have you heard about this case in any way?

A. Just in passing. I noticed something in the paper yesterday,—the headlines. I did not read the details.

Q. You have no information except what you read in the newspapers?

A. I do not have, no, sir.

Q. No one has talked to you about this case?

A. No, sir, not at all.

Q. You never discussed it with anyone?

A. I have not.

Q. You have no opinion at this time one way or the other?

A. No, sir, I do not have.

Q. You have served on juries before, have you?

A. No, sir, I never have.

Q. This is your first call?

A. That is correct, sir.

Q. I think I asked you—you have a wife and some children?

A. I have one son,—married son.

Q. Yes. You do not know any of these parties?

A. I do not, no ,sir.

Q. Or any of the officers or agents of the Internal Revenue office?

A. Well, not of the Internal Revenue, I do not.

Q. Have you had any tax difficulties with the Federal Government or the State Government at any time?

A. No, sir.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. I know of no reason why I cannot.

To Juror Arthur Paymar:

Q. (By the Court) Mr. Arthur Paymar,—is that the name?

A. Paymar, yes, sir.

Q. Where do you live?

A. 28 Hartford, in this city.

Q. How long have you lived here? A. All my life.

Q. You are married and have a family?

A. Yes, sir, Your Honor.

Q. What is your occupation?

A. I am a canned food buyer for a local chain.

Q. For whom?

A. For a local grocery chain—Klein's Super Markets, to be exact.

Q. The Klein Stores? A. Yes, sir.

Q. You are the purchasing agent for them in certain respects—certain merchandise?

A. Canned goods, yes, sir.

Q. How long have you been with the Klein Company?

A. Eighteen years.

Q. Have you ever had any tax difficulties?
A. No, Your Honor.
Q. With the State or Federal Government?
A. Neither.
Q. Do you know any of these parties?
A. No, I don't, Your Honor.
Q. Have you heard about this case in any way?
A. Just the headlines.
Q. Has anyone ever talked to you about this case?
A. No, Your Honor.
Q. And you do not know any of these parties?
A. No, I don't.
Q. No one has ever told you about this case who claimed to know the facts about it?
A. No, sir.
Q. Have you served on a jury in this court before?
A. No, sir, I haven't.
Q. Have you served in the State Court?
A. No, I haven't.
Q. You do not know any of these parties?
A. No, sir.
Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?
A. No, sir, I do not.
Q. Did I understand that you had lived here all of your life in St. Paul?
A. Yes, sir, practically.
Q. You attended schools in St. Paul?
A. Yes, sir.
Q. And you have been with the Kleins for how many years?
A. Eighteen years.

To Juror Kermit Bailey:

Q. (By the Court) Mr. Bailey, you live in South St. Paul?
A. That is right.

Q. How long have you lived there? A. 32 years.

Q. What is your occupation?

A. I am manager for an appliance store.

Q. For what store? A. An appliance store.

Q. What kind of appliances?

A. Well, Westinghouse Appliances—that is, refrigerators, ranges, and so on.

Q. Electrical equipment? A. That is right.

Q. You are married and have a family?

A. That is right.

Q. How long have you been with this appliance store, in that business?

A. This particular one, four years.

Q. Were you with a similar business before?

A. That is right.

Q. How long?

A. About three years, and then previous to that I was in the service about six years—

Q. About six years? A. Six years, that is right.

Q. You do not know any of these parties? A. I don't.

Q. You have not heard about this case in any way?

A. Outside of what I seen in the newspapers.

Q. From what you read have you any opinion one way or the other at this time?

A. None whatsoever.

Q. You haven't talked to anyone and no one has talked to you about this case?

A. No one has talked to me. I haven't talked to anyone.

Q. I am not sure that I asked you—I may have asked you before today—have you served on a jury in this court?

A. Yes, I have. It was either '46 or '47——I don't remember exactly.

Q. Have you served in the State Court?

A. I don't know whether this would come under the State—it was a local, at South St. Paul, on May 9th, last year.

Q. Probably not. Have you ever served on a criminal case?

A. Yes, I have.

Q. In this court?

A. In this court—that is, Judge Donovan's court.

Q. That was done five or six years ago?

A. That is right.

Q. What is your residence address?

A. 708 Marie Avenue, South St. Paul.

Q. Where is your place of business?

A. 140 North Concord, South St. Paul.

To Juror Lois F. Larsen:

Q. (By the Court) Mrs Lois F. Larsen, you live in St. Paul?

A. Yes, sir.

Q. What is your residence address?

A. 228 North Victoria.

Q. How long have you lived in St. Paul?

A. Oh, I have lived in St. Paul and Minneapolis about 27 years. I lived in Minneapolis a very short time.

Q. You are married and have children?

A. Yes, I have three.

Q. Are you employed or are you in business of any kind?

A. I am employed by the Secretary of State, Motor Vehicle Department.

Q. How long have you been employed by the Secretary of State's office?

A. About sixteen years.

Q. Have you had any tax difficulties with the Federal Government or the State Government?

A. No, sir.

Q. Have you served on juries before? A. No, sir.

Q. Neither in the Federal Court nor the State Court?

A. No, sir.

Q. What is your husband's occupation?

A. He is an executive in the motor vehicle department.

Q. Secretary of State's office?

A. That is right.

Q. How long has he been up there?

A. About 28 years.

Q. Has he had any tax difficulties in any way?

A. None that I know of.

Q. Do you know any of the officers in the Internal Revenue Department?

A. No, I am not acquainted with any of them.

Q. Do you know any of the persons connected with this case?

A. None.

Q. Have you heard about this case in any way?

A. Only the little bit I read in the paper, but I know nothing about it.

Q. Have you any opinion from what you read one way or the other?

A. No, I haven't.

Q. You have not talked to anybody who claimed to know about it?

A. No.

Q. You have not discussed it with anyone?

A. No, I haven't.

Q. How long do I understand that your husband has been in the Secretary of State's office?

A. About 28 years, I think.

Q. What are your husband's initials?

A. Walter E.—Walter E. Larson.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. No.

To Juror Bernard V. Minea:

Q. (By the Court) Bernard Minea, you live in St. Paul?

A. 540 Bidwell,—yes, I do, all my life.

Q. And you are with the First National Bank?

A. That is right.

Q. How long have you been down there?

A. Well, indirectly about 39 years—originally with Chattel National. The Merchants took them over and then the Merchants and the First consolidated, so they—

Q. They took you over? A. That is right.

Q. Have you had any tax difficulties with the Federal Government or the State Government at any time?

A. No, I have not.

Q. Do you know any of the persons I mentioned as being officers or agents in the Internal Revenue office?

A. None that you mentioned. I know two or three of them down there but none that you mentioned otherwise.

Q. You mentioned some whom you know?

A. That is right.

Q. But you said that wouldn't influence you?

A. That is right.

Q. Now, I think I talked to you about whether or not you have heard about this case?

A. That is right.

Q. You heard about it over the radio?

A. Not the radio—the newspapers.

Q. The newspapers, and I think you said that would not influence you in this case?

A. That is right.

Q. That you have no opinion one way or the other?

A. That is right.

Q. Have you served on juries in the Federal Court before?

A. Not in the Federal Court.

Q. You have in the State Court?

A. The State Court, over in Ramsey County.

Q. Have you served on criminal juries?

A. Yes, I have.

Q. That was in the State Court?

A. The State Court.

Q. How long ago?

A. Oh, about twenty years ago, I imagine. One thing I might add—what is Mr. Hoffmann's first name. It seems to me that I was on a jury on a case he tried—

Mr. Hoffmann: You were on two juries of mine in the State Court,—one about two years ago.

Q. (By the Court) That was how long ago?

A. I don't know. It must be fifteen years ago.

Q. Do you know Mr. Hoffmann personally?

A. Nothing other than just being on the case one time where he was the plaintiff, I believe, and the other time he was the attorney in the case, if I recall correctly.

Q. Well, the information obtained at that time would not influence you in this case?

A. Not a bit,—not a bit.

Q. You really, as I understand you then, do not have a speaking acquaintanceship with Mr. Hoffmann?

A. No, I do not.

Q. He has never represented you in any legal matters.?

A. No, he didn't.

Q. Do you know any of the other lawyers in this case?

A. Not as a speaking acquaintance, I don't believe, no.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. I do not.

To Juror George B. Muellner:

Q. (By the Court) Mr. George B. Muellner—

A. Here.

Q. What is your residence address?

A. 1278 Niles, St. Paul.

Q. How long have you lived in St. Paul?

A. All my life.

Q. You are married?

A. Yes.

Q. Do you have any children? A. Yes.

Q. How many? A. Two.

Q. What is your occupation?

A. I am working for the Skelly Oil Company.

Q. How long have you been with the Skelly Oil Company?

A. Going on 23 years.

Q. What is the nature of your work?

A. Well, it is mostly taking care of shipping and seeing that trucks are loaded, checking drivers, and stuff like that.

Q. You in a measure oversee the work of the company then?

A. Yes.

Q. See that it is carried on?

A. Yes.

Q. And that the work is done. How long have you been with the company?

A. Going on 23 years.

Q. Have you had any tax difficuties at any time in the past?

A. No.

Q. With the State or the Federal Government?

A. No, Your Honor.

Q. Have you heard about this case in any way?

A. No, just what I heard on the radio.

Q. Would that influence you one way or the other in this case?

A. No, it would not.

Q. You have no opinion at this time as to whether this defendant is guilty or innocent?

A. No, I have not.

Q. You have not talked to anybody about this case?

A. I have not.

Q. No one has talked to you or told you about it who claimed to know about it?

A. No, they haven't.

Q. Have you ever served on a jury in this court?

A. No, I haven't Your Honor. This is the first time I ever served on any jury.

Q. You have not heard about this case in any way except in the headlines or on the radio?

A. That is right.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. No, I don't.

BLEED THROUGH

To Juror H. V. E. Johnson:

Q. (By the Court) H. V. E. Johnson, you live at Cannon Falls?

A. Yes, sir.

Q. In the town of Cannon Falls? A. No, I don't.

Q. How far do you live from Cannon Falls?

A. Eight miles.

Q. Which direction? A. East.

Q. Do you live on a farm? A. Yes, sir.

Q. Farming is your business? A. Yes, sir.

Q. That is your business exclusively? A. Yes, sir.

Q. How long have you lived where you now live?

A. 35 or 40 years.

Q. All of your active life, anyway? A. That is right.

Q. Have you had any tax difficulties with the State or the Federal Government at any time?

A. No, sir.

Q. Have you heard about this case in any way?

A. No, sir.

Q. Do you know any of these gentlemen who are interested in this case?

A. No, sir.

Q. You have not talked to anyone about it? A. No, sir.

Q. No one who claimed to know the facts has told you about it?

A. No, sir.

Q. You have served on juries before? A. No, sir.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. No, I do not.

Q. You have been a farmer all of your life, have you?

A. Yes, sir.

Q. And you have lived practically all your life where you now live?

A. Yes, sir.

POOR COPY

To Juror Leon Hayward:

Q. (By the Court) Mr. Leon Hayward, you live in Pine Island?

A. Yes, sir.

Q. How far is Pine Island from Cannon Falls?

A. About 35 miles, I guess.

Q. You are married and have a family?

A. Married—I have no family.

Q. What is your occupation? A. Retired farmer.

Q. You lived on a farm most of your life?

A. All my life. Three years ago I moved to town.

Q. Until how long ago? A. Three years ago.

Q. What business did you go into then?

A. Kind of retired and looked after the farm.

Q. You retired from the farm and have not re-entered business, is that it?

A. That is true.

Q. Have you had any tax difficulties with the Federal or the State Government at any time?

A. No.

Q. Have you heard about this case in any way?

A. No, just mentioned—I remember seeing the headlines in the paper is all.

Q. You may have read about it at that time, did you?

A. I don't believe I even read about it, Your Honor. I don't remember anything about it, anyway.

Q. Well, did you form any opinion one way or the other at that time, or at any time since?

A. No.

Q. Has anyone talked to you about this case? A. No.

Q. You have no opinion at this time? A. No, sir.

Q. One way or the other? A. No, sir.

Q. Have you served on a jury in this court before?

A. I never served on any jury.

Q. This is your first jury experience? A. Yes, sir.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. No, sir.

To Juror Leonard O. Neilson:

Q. (By the Court) Mr. Leonard O. Neilson, you live in St. Paul?

A. Yes, Your Honor.

Q. How long have you lived here?

A. About twenty years.

Q. What is your occupation?

A. I work for the Government—

Q. Oh, yes. A. In the Postal Department.

Q. Yes. How long have you been in that department?

A. I have just been there about seven months.

Q. Have you heard about this case in any way?

A. Yes, Your Honor, I have.

Q. Have you read about it in the newspapers?

A. Yes, Your Honor.

Q. Did you form an opinion one way or the other from what you heard or read?

A. No, I didn't form an opinion.

Q. Has anyone talked to you about this case? A. No.

Q. You have not discussed it with anyone?

A. No, I haven't.

Q. Have you ever served on a jury in this court?

A. Yes, Your Honor—not in this court but the State Court.

Q. The State Court? A. Yes, Your Honor.

Q. You are married and have a family?

A. I have four children.

Q. Would the fact that you are employed by the Postal Department of the Government and the Government is prosecuting this case influence you in any way?

A. I don't think it would.

Q. How? A. No, I don't think it would.

Q. Well, you know better than anyone else. You feel that you can hear the evidence in this case, the instructions of the Court, and join in a fair and impartial verdict in this case irrespective of the fact that you are employed in the Postal Department?

A. Yes, Your Honor.

Q. How long have you been with the Postal Department, do I understand?

A. About seven months.

Q. Before that what was your occupation?

A. I was an interior decorator.

Q. How long were you an interior decorator?

A. About seven years, or since I came back from overseas.

Q. Were you in the Second World War?

A. Yes, Your Honor.

Q. How long?

A. I was overseas about a year,—South Pacific.

Q. About a year? A. Yes, Your Honor.

Q. Were you abroad? A. Yes, I was over in Manila.

Q. Then you came back to this country—

A. (Interposing) That is right.

Q. And you were a painter and an interior decorator for four or five years?

A. Yes, sir, four or five years.

Q. And since that time you have been employed in the Postal Department?

A. For the last seven months I have been in the Post Office.

Q. The last seven months. Now, you feel you can serve on this jury and join in a fair verdict in this case, notwithstanding the fact that you are employed in the Postal Department?

A. That is right.

Q. What is the work that you now do in the Postal Department?

BLEED THROUGH

A. I am sort of a utility man. I work on the "down", and I work on the "loading belt", and I sort mail, parcel post—

Q. Is your work at the new building or around this building?

A. At the main Post Office.

Q. Now, you have not talked to anybody about this case?

A. No.

Q. No one has talked to you about it? A. No.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. I do not.

To Juror May R. Ganfield:

Q. (By the Court) Mrs. May R. Ganfield? A. Yes.

Q. You live at Hastings? A. Yes, sir.

Q. How long have you lived there? A. 23 years.

Q. Are you employed or are you in business on your own account?

A. I am not.

Q. You keep the home?

A. I do.

Q. What is your husband's occupation?

A. My husband is an attorney.

Q. How long has he been practicing?

A. Since 1925, with the exception of three years when he was not practicing.

Q. Where is his office? A. In Hastings.

Q. Have you ever served in his office as a secretary?

A. No, not at all.

Q. Your work in the home is entirely separate from his work in the office, is that correct?

A. Entirely.

Q. How many children have you? A. Three sons.

Q. Do you know anyone connected with this case?

A. I do not.

Q. You do not know any of these lawyers?

POOR COPY

A. Not personally. The names of some are familiar, but not personally.

Q. You are not personally acquainted with any of them?

A. I am not.

Q. You do not know the defendant? A. I do not.

Q. Have you heard about this case in any way?

A. I have read of it in the newspapers.

Q. Did you form an opinion one way or the other when you read about it?

A. No, sir.

Q. You have no opinion at this time? A. No.

Q. One way or the other— A. No.

Q. No one who claimed to know about this case has ever talked to you about it?

A. No, sir.

Q. You have never discussed it or expressed an opinion about it one way or the other yourself? A. No.

Q. Have you ever served on a jury before?

A. No, I haven't.

Q. In the Federal Court or the State Court either?

A. No.

Q. Have you ever had any tax difficulties, or has your husband, to your knowledge, with the State or Federal Government?

A. No.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. I do not.

To Juror Lester J. Gilbert:

Q. (By the Court) Mr. Lester J. Gilbert, you live in St. Paul?

A. Yes, sir.

Q. How long have you lived here? A. All my life.

Q. What is your occupation?

A. I am the resident manager for the C. Reiss Coal Company in St. Paul.

Q. How long have you been with that company?

A. 27 years.

Q. You are married and have a family? A. Yes, sir.

Q. What is your residence address?

A. 515 South Saratoga.

Q. What is the nature of the work for your company?

A. Retail and wholesale selling of fuel.

Q. You are in charge of the sales—

A. (Interposing) Of the St. Paul office, yes, sir.

Q. Have you heard about this case?

A. I saw an article in the newspaper, yes, sir.

Q. Do you know any of the lawyers,—any of the persons connected with the case?

A. No, sir, I do not.

Q. From what you read have you formed any opinion one way or the other?

A. No, sir.

Q. You have no opinion at this time? A. I do not.

Q. Have you served on juries before?

A. In the Ramsey County District Court, I believe, twice.

Q. State Court? A. Yes, sir.

Q. But not in this court? A. No, sir.

Q. How long ago is it since you served in the Ramsey County District Court?

A. Oh, that is twelve or thirteen years ago, I believe.

Q. A good many years ago? A. Yes, sir.

Q. Have you had any tax difficulties with the State or Federal Government?

A. Other than paying them, no, sir.

Q. We have to do that whether we want to or not. You have had that same experience?

A. Yes, sir.

Q. That wouldn't influence you in this case?

A. No, sir.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. I do not.

To Juror Milton W. Baumann:

Q. (By the Court) Milton W. Baumann, you live in South St. Paul?

A. That is right.

Q. How long have you lived there? A. Five years.

Q. Before that where did you live?

A. Newport, right across the river from South St. Paul.

Q. How long had you lived over at Newport?

A. Three years.

Q. You are married? A. That is right.

Q. Do you have a family? A. Yes.

Q. How many children? A. Five.

Q. What is your occupation?

A. I am with Griggs, Cooper & Company as a machine operator at the present time.

A. I am sorry?

A. I am with Griggs, Cooper & Company as a machine operator at the present time.

Q. How long have you been with Griggs, Cooper?

A. One year.

Q. What sort of a machine do you operate?

A. Quite a few of them—most any of them over there—candying machines or folding machines.

Q. I see. Before you went with Griggs, Cooper, what was your occupation?

A. Production man with the Raymond Laboratories.

Q. How long had you been with Raymond Laboratories?

A. Five years.

Q. What was your work there?

A. Well, overseeing all production in the plant.

Q. Before that what was your occupation?

A. With the Direct Oil Service Corporation of Minneapolis,—in the office over there.

Q. How long were you in their office? A. Ten years.

Q. Have you ever served on a jury before?

A. County District jury.

Q. Not in this court? A. Not in this court, no.

Q. Have you heard about this case in any way?

A. Oh, I saw an article in the paper one time. I don't know how long ago it was—

Q. Did you form any opinion one way or the other from what you read about it?

A. I didn't read it because I didn't know the parties involved.

Q. Do you know any of the parties connected with this case?

A. No, I do not.

Q. Has anyone who claimed to know anything about the facts talked to you about this case?

A. No, they haven't.

Q. You have not discussed it with anyone yourself?

A. No.

Q. Or formed any opinion one way or the other? A. No.

Q. Have you ever had any tax difficulty with the State or Federal Governments?

A. Oh, I have been called in to re-check them,—gone over a little bit and settled.

Q. Reported a little further? A. That is right.

Q. And took your medicine like the others?

A. That is right.

Q. Would that influence you in this case? A. No.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. I know of no reason at all.

To Juror Lloyd A. Davis:

Q. (By the Court) Lloyd A. Davis, what is your address?

A. 1533 South Concord, South St. Paul.

Q. How long have you lived in St. Paul?

POOR COPY

A. About eight years and a half.

Q. Before that where did you live?

A. Northfield, Minnesota.

Q. How long had you lived down there?

A. About eight or ten years, I guess.

Q. What is your occupation?

A. Ticket writer for the St. Paul Union Stockyards Company.

Q. I didn't get the nature of your work from that answer—

A. Ticket writer.

Q. Ticket writer for the St. Paul Union Stockyards Company?

A. Yes, sir.

Q. How long have you been with the St. Paul Union Stockyards?

A. Six years.

Q. Before that what was your work?

A. I worked for the Sun Commission Company for two years and a half.

Q. Have you heard about this case in any way?

A. No, I haven't.

Q. Do you know any of these parties? A. No, sir.

Q. Do you know any of the officers or employees of the Internal Revenue Department who have been mentioned in this case?

A. No, I don't.

Q. You do not know any of these lawyers? A. No, sir.

Q. Have you heard about this case in any way?

A. Oh, I heard it on the radio but didn't pay much attention to it.

Q. Did you form any opinion one way or the other from what you heard?

A. No, sir.

Q. Has anyone who claimed to know the facts talked to you about this case?

A. No, sir.

Q. Have you ever discussed it with anyone,—formed an opinion of any kind about the case?

A. No, sir.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. No, sir.

To Juror Adrian G. Carlson:

Q. (By the Court) Mr. Adrian G. Carlson, what is your residence address?

A. 778 Holly Avenue.

Q. Here at St. Paul? A. St. Paul, yes.

Q. How long have you lived here?

A. I have lived here all my life.

Q. What is your occupation?

A. I am a teller at the Empire National Bank.

Q. How long have you been with the Empire National?

A. About twelve years.

Q. Before that what was your work?

A. Oh, I was in a small grocery business for three or four years.

Q. You are married and have a family?

A. No, I am single.

Q. You are a single man? A. Yes, sir.

Q. Have you had any difficulty with tax matters, state or federal, at any time in the past?

A. No.

Q. Do you know anyone connected with this case?

A. No, I do not.

Q. You have not heard about it in any way?

A. I have read about it in the papers.

Q. Did you form any opinion from what you read one way or the other?

A. No, I have not.

Q. You have no opinion at this time one way or the other?

POOR COPY

A. No, sir.

Q. Have you ever served on a jury before?

A. I have on the State juries, yes.

Q. But not in this court? A. Not in this court.

Q. How long ago is it since you served on a State, jury?

A. Oh, I get called almost every year, it seems. I was on about fifteen months ago.

Q. In the State Court? A. On a State jury.

Q. Have you served on any criminal cases?

A. No, I have not. That was all civil.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. No, sir, I do not.

To Juror Theodore H. Palmer:

Q. (By the Court.) Mr. Palmer, you live in St. Paul?

A. Yes, sir.

Q. What is your residence address?

A. 1879 Highland Parkway.

Q. How long have you lived in St. Paul?

A. About twenty years.

Q. What is your occupation?

A. I am manager, and a partner, the Fire Brick Supply Company.

Q. How long have you been in that business?

A. Eight years with that company.

Q. What other company?

A. It is about eight years since we formed that company but I have been in an allied field for some 22 years.

Q. All your active life, then?

A. Yes, sir.

Q. What is your work with your company now?

A. Managing.

Q. You are the manager of the business?

A. That is right.

Q. Have you had any tax difficulties with the State or Federal Government at any time?

A. I have had a minor problem with the Federal, but nothing serious, auditing—a couple of audits, tax deductions.

Q. It was adjustable and was adjusted then?

A. Adjusted.

Q. The difficulties were ironed out?

A. Oh, yes,—usually have to end up paying.

Q. You have not talked to anybody about this case?

A. No, other than around the office.

Q. No one who claimed to know the facts about the case has talked to you about it?

A. No.

Q. And you have not heard anything that has caused you to form an opinion one way or the other?

A. No, sir.

Q. You are married? A. Yes, sir.

Q. Do you have any children? A. Four.

Q. You have been in your present business about eight years, did I understand?

A. With this company, yes.

The Court: Is there anything further, gentlemen?

Mr. Landrum: The Government has nothing, Your Honor.

The Court: The defense?

(Question submitted to the Court by Mr. Graff.)

The Court: Which juror is employed by the Post Office?

Juror Neilson: Right here.

To Juror Leonard O. Neilson:

Q. (By the Court.) Your name and your residence address?

A. My name is Loenard O. Neilson. I live at 1142 Marshall Avenue, St. Paul.

Q. How long have you lived there?

A. I have lived there around about twelve years.

Q. I am not sure that I got that street address—

A. 1142 Marshall Avenue.

Q. And your name was— A. Neilson.

Q. Neilson, yes.

The Court: Mrs. Ganfield, you live at Hastings?

Juror Ganfield: Yes, sir.

The Court: Mr. Gilbert, you live in St. Paul?

Juror Gilbert: Yes, sir.

The Court: Mr. Baumann, what is your street address?

Juror Baumann: 1228 Fifth Avenue South.

(Note submitted to the Court by Mr. Graff.)

The Court: Mr. Rea, you have served on the Grand Jury five or six years ago, as I remember?

Juror Rea: Yes, sir.

The Court: Were any of these lawyers concerned with any of the business that was before the Grand Jury at that time?

Juror Rea: I believe the gentleman on the far right was there once. I am almost positive.

The Court: Mr. Landrum, will you stand up?

(Mr. Landrum arose.)

Juror Rea: No, the gentleman in the glasses. I don't recall the name—

(Mr. Graff arose.)

Juror Rea: That is the gentleman there. He didn't

wear glasses then, I don't believe. I didn't recognize him with the glasses on.

The Court: Well, he is getting a little older all the time.

Juror Rea: That is right.

The Court: You remember him, do you?

Juror Rea: I remember him, yes, sir.

The Court: You remember of him being before the Grand Jury?

Juror Rea: That is right.

The Court: Presenting matters at that time?

Juror Rea: That is right.

The Court: Now, Mr. Gutsche, do you remember any of these lawyers?

Juror Gutsche: If that is the case, I remember him, too, because we were together.

The Court: Do you remember him? Do you remember that he was before the Grand Jury?

Juror Gutsche: I believe he was.

The Court: You remember that also?

Juror Gutsche: Yes.

(Jury list handed to counsel by the Clerk.)

Mr. Graff: If the Court please, I wonder if I may suggest a recess at this point?

The Court: Yes, only I want to select this jury this afternoon and the alternates.

Court will recess for ten minutes.

(Whereupon, at 4:00 o'clock P. M. a brief recess was taken.)

The Court: You may proceed with the selection of the jury.

(Counsel for the Government and the defendant exercised their jury strikes at this point.)

The Clerk: Will the following jurors please answer as their names are called: Mrs. Alice F. Pfeiffer, Gustav A. Peterson, Leo Leonard Ament, Willard W. Baker, Erick R. Kempe, Arthur Paymar, George B. Muellner, H. V. E. Johnson, Milton W. Baumann, Lloyd A. Davis, and Adrain G. Carlson.

Will all the jurors whose names were not called please step down from the jury box and all jurors whose names I called take seats in the jury box.

The Court: Poll the jury, Mr. Clerk.

(The jury was polled.)

The Court: Swear the jury, Mr. Clerk.

(The jury of twelve was duly sworn by the Clerk.)

The Court: You may call the jurors for two alternates, Mr. Clerk. As your names are called, please make answer, come forward and have chairs in this front row.

(Four additional jurors were thereupon called and duly sworn by the Clerk.)

The Court: The gentlemen, those of you who have just been called, are for the purpose of securing two alternates. Sometimes jurors become ill, sometimes members of the immediate family of jurors become ill, or there may be some sort of an emergency that makes it at least difficult for them to continue jury service, and courts have found that it is proper where a case may last a rather unusual length of time to impanel alternates. We will impanel two in this case. That will give each side a challenge where four are

called and the two that are selected will sit in this case, and should any juror for any reason become unable to serve or disqualified from serving, an alternate may be chosen to serve in his place. So that is the purpose for which you are now called.

Is there any one of the four of you who didn't hear my brief remarks of what this case is about? If so, raise your hand.

(No response.)

Do any one of the four of you know anyone connected with this case—the lawyers, or the defendant, or the officers and employees of the Internal Revenue Department, or anyone connected with the case?

(No response.)

To Juror Chester G. Engstrom:

Q. (By the Court.) Mr. Engstrom, I wish you would stand, please. I can't very well see you.
A. (Juror stands.)
Q. You live in St. Paul? A. Yes, sir.
Q. How long have you lived here? A. Since 1936.
Q. What is your residence address? A. 985 West Iowa.
Q. How long have you lived there?
A. I have lived there five years.
Q. You are married? A. I am married,—no children.
Q. What is your occupation?
A. I am an accountant for the State of Minnesota.
Q. What department of the State?
A. The Division of Social Welfare.
Q. How long have you been with that department?
A. Since 1941.
Q. Was that your first service for the State?
A. That was my first service for the State.
Q. I see. It is office work that you do?

A. Office work, that is right, sir.

Q. You have had no difficulty with the State or Federal Government in tax matters?

A. None whatever, sir.

Q. You make your return, pay your taxes, and that ends the matter, so far as you are concerned?

A. That is right.

Q. Do you know this defendant?

A. No, sir.

Q. Have you heard about this case in any way?

A. Just what I have read in the paper.

Q. Did you form an opinion from what you read in the newspapers about the case, that is, one way or the other?

A. No, I haven't.

Q. You have no opinion at this time?

A. None whatever.

Q. (Continuing.) As to whether this defendant is guilty or not guilty?

A. No, sir.

Q. You have not heard about it on the radio?

A. No—I don't recall hearing. If I have, I haven't taken any notice of it whatever.

Q. You have not talked to anyone who claimed to know the facts in connection with the case?

A. No.

Q. You have not discussed the case with anyone at any time?

A. Not anyone.

Q. I believe I asked you—you do not know this defendant?

A. Yes—I do not know the defendant.

Q. Have you ever served on a jury before?

A. It was for the Municipal Court, I believe, in some civil cases.

Q. You have not served in this court before?

A. Never in this court, no, sir.

Q. You have never served on a grand jury?

A. Never on a grand jury.

Q. In the State Court or the Federal Court?

A. No, I have not.

Q. Do you know any reason why you can't serve as an alternate or as a juror in this case and join in a fair and impartial verdict if you are called upon to do so?

A. No, I do not.

Q. How long have you lived in St. Paul?

A. Since 1936.

Q. Where did you live before that?

A. Well, I was going to school in Minneapolis for four years and prior to that I lived in Two Harbors.

Q. Two Harbors in this state?

A. In this state, that is right, sir.

The Court: You may be seated.

To Juror Roy G. Hoge:

Q. (By the Court.) Mr. Hoge, you live in St. Paul?

A. Yes.

Q. How long have you lived here?

A. 24 years.

Q. What is your residence address?

A. 2889 North, Highway 61.

Q. You are married and have a family?

A. Yes,—one boy.

Q. What is your occupation?

A. A well drilling contractor.

Q. I beg your pardon?

A. Water well drilling contractor.

Q. How long have you been engaged in that business?

A. Oh, it is about 25 years—all my life, practically.

Q. In St. Paul and the surrounding country?

A. St. Paul and surrounding country.

Q. Have you ever had any tax difficulties with the State or Federal Government?

A. No.

Q. Have you read or heard about this case in any way?

A. No, I haven't.

Q. No one who claimed to know the facts has ever talked to you about it?

A. No.

Q. You have never discussed it with anyone?

A. No, sir.

Q. Have you served on juries before? A. No, sir.

Q. This is your first jury service? A. That is right.

Q. Do you know the parties connected with this case—I mean the lawyers or the defendant?

A. No, sir.

Q. You are not acquainted with any of them? A. No.

Q. You have not heard about this case in any way?

A. No, sir.

Q. Did you ever serve on a grand jury? A. No.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict if called upon to serve as a juror?

A. No.

Q. Do you know any of the agents of the Internal Revenue Department here in St. Paul?

A. Not personally, no.

The Court: You may be seated.

To Juror Robert G. Larson:

Q. (By the Court.) Mr. Robert G. Larson, you live in South St. Paul?

A. Yes, sir.

Q. How long have you lived there?

A. Three and a half years.

Q. Before that where did you live?

A. St. Paul, practically all my life.

Q. What is your residence address now?

A. 352 Park Lane.

Q. You are married and have a family?

A. Yes, sir,—two children, both grown.

Q. Have you had any tax difficulties with the State or Federal Government at any time in the past?

A. Well, I lived in New Jersey in about 1937 and I guess my tax return didn't get into the Federal Government fast enough to suit them or something, so they came and looked me up; they found me all right—I was here.

Q. And you made a return, did you?

A. Pardon?

Q. You made a return then, did you?

A. Yes, I turned it in in Newark, but in the meantime I moved back to St. Paul. That's the only trouble I ever had.

Q. You had lived here and moved away and then came back again?

A. Moved back again, that is right.

Q. That was the only difficulty you have had?

A. That is right.

Q. You got that straightened out all right, I suppose?

A. Yes, sir.

Q. Do you know any of the officers or agents of the Internal Revenue office here?

A. No, I don't.

Q. Do you know any of these lawyers?

A. No, sir.

Q. Do you know the defendant in this case?

A. No, I don't.

Q. Have you heard about this case in any way?

A. Well, I have read the headlines, you might say. I haven't even taken an interest enough in it to read the article.

Q. Well, from what you read or heard about it, have you formed any opinion one way or the other?

A. No, sir.

Q. You have no opinion at this time?

A. Not at this time.

Q. No one who claimed to know the facts has talked to you about it at any time?

A. No, no one has discussed it with me.

Q. You have served on juries before?

A. No, sir, I have not.

Q. You have never served on a grand jury?

A. On no jury, State or Federal.

Q. Do you know anyone connected with the Bureau of Internal Revenue?

A. No, sir. The only person I know in this court room—I don't know if he is here or not—"Dutch" McGowan.

Q. Mr. McGowan, the United States Marshal?

A. That is right.

Q. How long have you known him?

A. Well, we were in the Army together, in the "Big War".

Q. The First War? A. That is right.

Q. Would that influence you in this case? A. No, sir.

Q. He wouldn't want it too, I am sure of that. You do not know anyone connected with the Internal Revenue office?

A. I do not.

Q. You got your difficulties straightened out and now you don't know—

A. I don't even remember the name of the party that looked me up, but it was 1937, so I would have to remember it pretty well—fifteen years.

Q. What is your occupation?

A. I am a department head for Swift & Company.

Q. How long have you been with Swift & Company?

A. Thirty years.

Q. What department are you in?

A. I really have two—Table Ready Meats and Canned Foods.

Q. And you have been with Swift & Company for thirty years, did I understand?

A. Yes, sir.

Q. You have served them away from here and you have served them here?

A. That is right.

Q. I think I asked you—you have a family?

A. I do.

Q. And children—they are adults?

A. They are adults. The "baby" is 25 this week.

Q. Is your work in South St. Paul at the Swift plant?

A. That is right.

Q. And you returned back here from New Jersey to serve in the plant here?

A. That is right,—came back in 1938.

Q. Now, you haven't heard about this case in any way?

A. Pardon?

Q. You haven't heard about this case except what you have read in the newspapers?

A. I have noticed in the papers but haven't taken any interest in it.

Q. You have not formed an opinion one way or the other?

A. I haven't read the article even.

Q. Yes. Do you know of any reason why you can't serve as an alternate or as a juror if called upon to do so in this case and join in a fair verdict in this case?

A. Not that I know of.

Q. Well, you ought to know if anybody would.

A. Yes.

To Juror Frank P. Paddock:

Q. (By the Court.) Now, Mr. Frank P. Paddock, you live in St. Paul?

A. Yes, sir.

Q. What is your residence address? A. 1302 Forest.

Q. How long have you lived in St. Paul? A. All my life.

Q. You are married. A. Yes, sir.

Q. Do you have any children?

A. Yes,—a boy 21 and a daughter 15.

Q. What is your occupation?

A. Superintendent of the rubber adhesives, Minnesota Mining.

Q. How long have you been with Minnesota Mining?

A. About 24 years.

Q. Now, just what is your work?

A. Oh,—I have charge of the manufacturing of adhesives.

Q. That is Sctoch tape?

A. Scotch tape.

Q. And you have charge of the manufacturing work of that product?

A. Yes, sir.

Q. You have been there for 24 years?

A. 24 years last April.

Q. Have you had any tax difficulties with the United States?

A. No, sir.

Q. Or with the State of Minnesota? A. No, sir.

Q. Have you ever served on juries before?

A. No, this is the first time.

Q. You have never served on a grand jury? A. No, sir.

Q. You do not know any of these parties? A. No, sir.

Q. You do not know the defendant? A. No, sir.

Q. You have not heard about this case?

A. Very little—the headlines in the paper is about all. I didn't follow through on it or anything.

Q. You have read some of the newspaper accounts of it?

A. Very little.

Q. Did you form any opinion one way or the other from what you read?

A. No, your Honor.

Q. Has anyone who claimed to know the facts talked to you about the case?

A. No, sir.

Q. Have you discussed it with anyone? A. No, sir.

Q. You have no opinion one way or the other at this time?

A. No, sir.

Q. Do you know of any reason why you can't serve as an alternate in this case or as a juror if you were called upon to do so and join in a fair and impartial verdict in this case?

A. No, sir, I see no reason why I couldn't.

Q. What newspapers do you read?

A. The Press and Dispatch.

Q. The St. Paul papers? A. Yes, sir.

Q. You do not read the Minneapolis papers?

A. Sunday paper.

Q. The Sunday Minneapolis paper?

A. Yes.

(Question handed to the Court by Mr. Graff.)

The Court: Let me ask the four of you—I think I have already asked some of you: Do you know anyone connected with the Internal Revenue Office here in St. Paul? If so, raise your hand.

(No response.)

Are any of you acquainted with anyone connected with the United States Attorney's office in St. Paul?

If so, raise your hand.

(No response.)

Have any of the attorneys of that office ever represented you in any legal matters?

(No response.)

I will ask the four of you—first I will make this statement to you, that this defendant is presumed to be innocent and that presumption remains with him throughout the trial of this case and until the Government has proved him guilty beyond a reasonable doubt. Is there any one of the four of you who for any reason could not give the defendant the

benefit of the presumption of innocence? If so, raise your hand.

(No response.)

On the other hand, there are perhaps some citizens, some people, who feel that they could not under any circumstances join in a verdict of guilt against anyone. That is the other extreme from the one I have mentioned. Do any one of you have that sort of a feeling, that is, irrespective of the facts or instructions of the Court, you just could not convict your fellow man? If you feel that way, inform the Court, because that would be, as I say, the other extreme. It would be improper; you would not be able to qualify as a juror in any sort of a criminal prosecution.

(No response.)

I believe that is all.

(Further challenges exercised by counsel for the Government and for the defendant.)

The Court: Mr. Engstrom and Mr. Hoge, will you step to the back of the court room. Mr. Larson and Mr. Paddock, you will stand and raise your right hand.

(The jurors Larson and Paddock were duly sworn by the Clerk.)

The Court: The alternates will sit with the jury throughout the trial of this case and will serve as jurors if you are for some reason called upon to do so at any time in the progress of the trial. It will be the privilege of the Court to ask you, or one or the other of you, to serve as a juror in the trial of this case. That will not become necessary, of course, if these jurors are not disqualified or unable for some reason from serving as jurors. Twelve constitute a jury. You constitute the alternates, and you may be called upon to serve in place of one or two of these jurors.

(To the entire jury.) Members of the jury, the United States Marshal has made arrangements for your accommodations at the Lowry Hotel. You will be provided rooms, food and such accommodations as may be necessary for your comfort and for your benefit while you are serving as jurors in this case. The Marshal or his agents will be on hand and you may inform whoever is there of such desires as you may have. There will be a telephone in the Marshal's quarters and you can use that telephone under certain conditions, of which the Marshal will advise you.

There will be a lady in attendance who will take care of the wants of the lady who has been impaneled as a juror in this case.

This precaution is not always taken. It often is taken in cases that the Court considers of sufficient importance or sufficient extent as to justify the action. It is as much for the protection of the members of the jury as for any other reason. It is barely possible that some embarrassing matter may develop in the trial of a case that would be embarrassing to you. The Court desires to throw every influence and protection possible around juries that are engaged in the trial of important cases. Consequently, this provision has been made for your comfort and your welfare. If you are not satisfied with everything that is provided, tell the Marshal and tell him to inform me.

Now, you have been impaneled and sworn to try this case and to render a fair and impartial verdict, according to the evidence and according to the law. That is your greatest duty now as a citizen. Do not permit anyone to communicate with you about this case wherever you may be, whether it be in the hotel, on the street, in this building, or any place that you might happen to be. You must guard against anyone communicating with you about this case. Should anyone undertake to do so, inform whoever it may be that you are

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on this jury and that they must refrain from communicating with you. Should they persist, you may inform the Court.

Now, undertake to keep your minds free from a conclusion as to what the verdict in this case should be until you have heard all the evidence, the arguments of counsel, and the instructions of the Court. The case will then be submitted to you for your collaboration, for your study of the evidence together, and for your conclusion as to what the verdict should be. This case is to be decided on the evidence that is heard here during the trial and not upon anything that might occur elsewhere.

I think I said this morning—anyway, I have often said that people frequently make remarks about a case that is on trial. I think it is usually thoughtless remarks, but such remarks might possibly be far-reaching, although the speaker might have absolutely no facts upon which to base his statement or conclusion, so that is the reason why we want to hear the sworn testimony and that is the basis for your verdict in this case. Do not forget it.

The alternates will be accommodated along with the jurors in this case. Your hours will be the same as the hours of these jurors. You will serve with them wherever they are and in this court room until the end of this trial. If all the members are still on the jury, not disqualified for any reason,—if there has been no emergency that has caused them to be excused from this jury, you will then be excused and the case will be submitted to the jury and they will return a verdict. Otherwise you will be called upon, if it is necessary, to serve on the jury and join the jury in reaching a verdict in this case.

I believe there is nothing more at this time?

(No response.)

It is slightly after 5 o'clock. Your hours during this

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trial will be from 10 to 12:30 and from 12:30 until 2:06 o'clock you will have a luncheon period. You will then serve from 2:00 until 5:00 o'clock unless the Court recesses at an earlier hour. That may be done at times.

The deputies and bailiffs in charge of the jury may come forward and take the oath.

(The deputies were duly sworn by the Clerk.)

The Court: You will now, members of the jury and the alternates, retire to the St. Paul Hotel. The officers will come forward. You may retire at this time. The audience will keep their seats, please.

Juror Alice F. Pfeiffer: Your Honor, may I speak to you afterward, or must I speak to you now?

The Court: (To the deputy.) You may see that the lady has an opportunity to speak to the Court. The gentlemen on the jury may proceed with the officer in charge.

(Discussion off the record.)

Mr. Graff: May the record show that Juror No. 1 has been excused with the consent of counsel on both sides and in her place and in her stead the first alternate juror will serve as a regular juror. On behalf of the defendant, we are agreeable to such procedure.

Mr. Landrum: It is satisfactory to the Government.

The Court: Very well. Then Robert G. Larson, the first alternate, will be asked to serve as a juror.

Mrs. Pfeiffer, in view of the fact that you are greatly needed at home by your family, counsel have agreed that the Court might excuse you from serving on this jury and that alternate No. 1 may be called to serve in your stead. That is the purpose of having alternates; you see the effect of it now. So you are excused and you may go home.

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Proceedings had in the foregoing entitled matter before the Honorable Robert C. Bell on May 20, 1952. Appearances are as has been heretofore noted.

The Court: Mr. Clerk, let me have the jury list, please.

(Document handed to the Court.)

The Court: Mr. Robert G. Larson, South St. Paul, will occupy a position—

Mr. Landrum: Just a moment, if the Court please. Could I approach the Bench?

The Court: Yes. Mr. Graff, you will come forward also.

(Discussion between Court and counsel at Bench off the record.)

(The following proceedings were had at the Bench, outside the hearing of the jury:)

Mr. Graff: At this time the defendant wishes to take exception to the action of counsel for the Government in handing some communications to the Court which apparently were written by one of the jurors on this panel, of which the defense has absolutely no information. We submit that it is highly irregular, and may the record show that the Court is examining the material submitted by counsel for the Government.

Mr. Landrum: Counsel for the Government this morning has called the Court's attention to the fact that the juror, M. W. Bauman, according to the records of the Collector of Internal Revenue in and for the District of Minnesota has not paid any income tax for the year 1948. That the amount of tax was $4,583.90. The penalty thereon, $1,145.88, with interest figured to the 15th day of November, 1950, is $458.38. That he has been called upon to make such settlement with the Government. That in pursuance thereof he has filed papers but that there has been no settlement. That he fur-

ther in his income tax return for 1949 owes a tax of $2,966.52 from which there is a credit of $1,000.00 leaving a balance of $1,966.62. That he has made no income tax return whatsoever for the year 1950. That he is familiar with these matters and has been on numerous occasions in conference with officials of the Department of Internal Revenue with relation thereto. That there have been tax liens filed against him of which he has knowledge, and that he has sold his home against which there is such a tax lien.

Mr. Graff: If the Court please, in view of the statement of counsel that has been read into the record, it is very apparent to me that there has been an investigation made by the Government of these particular jurors that are on this jury panel, and at this time we move the Court to declare a mistrial.

The Court: This is old data obtained by the Government in regard to this one party, as I understand the situation.

Mr. Graff: Well, Your Honor, how could they know that this would exist unless they had made a search as to everyone there?

Mr. Landrum: If the Court please, let the record show that the facts of the matter are that counsel for the Government had no information whatsoever with relation to this matter until this morning when the names of the jurors had been published in the Press and our attention was then immediately called to it by the Chief of the Intelligence Unit of the Internal Revenue Department in the City of St. Paul. It did not come to our attention until at least 8 o'clock this morning.

Mr. Graff: If the Court please, I do not accept that statement of fact. If counsel wishes to prove that, as a matter of fact, there are ways and means of proving it. I do not accept the statement. I think that this is evidence of the fact that there has been an investigation made and we take ex-

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ception to it. We think it is highly improper and irregular and we ask the Court, request the Court to declare a mistrial of this case.

The Court: The motion for a mistrial is overruled. Now, I am going to send this jury out to the jury room and have this man who is on the jury, Milton W. Baumann, brought in here and I will ascertain whether he is the man and what the facts are, and if that is true, he will be excused from this jury and this alternate placed in his stead. I think that will clear this whole matter up and we will proceed with this trial.

Mr. Graff: May we have an exception to the Court's ruling?

The Court: Very well.

(Thereupon the following proceedings were had in open court:)

The Court: Gentlemen of the jury, and the alternates, you may retire to the jury room for the present and await the call of the baliff. You may retire at this time to the jury room.

(Thereupon the baliff returned to the court room with the juror, Milton W. Bauman, and the following proceedings were had:)

The Court: What is your name?

Juror: Milton W. Baumann.

The Court: Where do you live?

Juror: 1228 Fifth Avenue South, South St. Paul.

Mr. Graff: If the Court please, may I, for the purpose of the record, make a statement into the record at this time?

The Court: I will hear you in just a few minutes.

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Mr. Graff: All right.

The Court: Did I ask you yesterday whether you had any tax difficulties with the State or Federal Government?

Juror: Yes, sir, and I told you I had. I said that I had difficulties and was straightening them out.

The Court: When did your difficulties begin?

Juror: Back in 1945.

The Court: Did you make a return to the Federal Government for 1950?

Juror: Not yet. I wrote and told them that I had wanted to make a return because I had some information to look up and I haven't completed it yet.

The Court: Did you make a return for 1949?

Juror: Yes, sir.

The Court: For 1948?

Juror: Yes, sir.

The Court: Did you pay taxes for either of those years?

Juror: No, I haven't paid it all. I still owe the Government money.

The Court: You are still indebted to the Government for 1948, are you?

Juror: Yes, sir.

The Court: 1949?

Juror: Yes, sir.

The Court: Have you paid all the taxes preceding 1948 to the Federal Government?

Juror: Well, that I wouldn't know exactly without—I have been paying but I don't know where it goes back to,

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but I know that there is—that I do owe the Government money. I just have not been able to pay it.

The Court: Have you made a return yet for 1950?

Juror: No, I have not. That return is easy to make because I did not work.

The Court: Have you made a return for 1951?

Juror: 1951, no, no tax on that, but I will make that when I make the '50.

The Court: You have not made the return yet for 1951?

Juror: That is right. I have to make out my '50 first.

The Court: Is this your signature?

Juror: Yes, sir.

The Court: You wrote that letter?

Juror: Yes.

The Court: How long have your tax problems, controversies with the Government been pending?

Juror: Well, since, I think it started in 1947—I am not sure—'47 or '48. That was when there was a correction in the '45 and '46 returns.

The Court: Some four or five years?

Juror: That is right.

The Court: You have been conferring at various times with officers of the Internal Revenue Department, have you?

Juror: Yes, with reference to collection of the taxes.

The Court: And with reference to how much the taxes were?

Juror: No, that was all straightened out, in, as I say, '47

or '48. I do not know what year it was that they brought up the matter of return for 1945 and '46.

The Court: You think your tax controversy with the Government is all straightened out?

Juror: Excepting what I owe them, yes. There is no question about—

The Court: When you have not made a return for 1950 and '51?

Juror: Well, it is not a controversy. It is just I have got information that I have to dig out for '50 and '51.

The Court: Well, you have not made a return, have you?

Juror: No, I have not. I asked for a continuation.

The Court: For 1950 and 1951?

Juror: That is right.

The Court: Do you know how much you owe for either of those years?

Juror: I don't owe anything for either year.

The Court: It is years prior to 1950?

Juror: That is right.

The Court: That you owe taxes to the Government?

Juror: Right.

The Court: You have been corresponding with officers of the Government about these tax matters, have you not?

Juror: Yes.

The Court: And you wrote this letter?

Juror: Yes.

The Court: To the Collector of Internal Revenue, your letter dated August 28, 1950, is that correct?

Juror: Yes.

The Court: How many times have you conferred with officers of the Internal Revnue Department of the United States?

Juror: I would not know exactly how many times. I have talked to several men. I have talked to Mr. Small of the South St. Paul office.

The Court: What others have you talked to?

Juror: Well, I would not know who I talked to over the phone. Those are the only people that have called on me.

The Court: Have you called at the Internal Revenue office and conferred with officers?

Juror: No, not lately I have not.

The Court: How long ago?

Juror: Well, I called when they wrote about the '50, I called up there and talked to someone. Now, who it was, I do not know, and asked him to send me another set of 1950 returns because I had—

The Court: Did you call at the office and confer with anyone there?

Juror: No, I did not go in personally. I called by phone.

The Court: Have you called personally and conferred with anyone in the Internal Revenue ofice?

Juror: No, I have not, not lately.

The Court: Not lately—how long ago?

Juror: Well, when I was called in back in 1947 or '48.

The Court: Did you file amended returns at that time?

Juror: Yes.

The Court: Was it prepared for you in the Internal Revenue Department?

Juror: Yes.

The Court: Who prepared it, do you know?

Juror: I do not remember his name, but he is not over there any more. I understand he went to California. I really do not remember his name. I could not dig it out—I could dig it out of the correspondence.

The Court: Why did you not make a full, fair statement of this matter yesterday?

Juror: I did. It was a matter of expenses which they did not allow and so we had to take what they would allow.

The Court: You had your tax difficulties thrashed out, settled, according to your statement yesterday.

Juror: That is right.

The Court: And that is not true, is it?

Juror: I owe the taxes, yes.

The Court: All right. And you have not made a return for 1950 and '51, have you?

Juror: No, I have not.

The Court: All right. Your matters have not been thrashed out and terminated as you said yesterday?

Juror: Well, it is a matter of filing the return. There is no tax, but I have a lot of details to get out.

The Court: I will ask you again why you did not explain this situation to the Court yesterday?

Juror: Well, I understood your question to say whether there was any controversy with the Government on taxes.

The Court: I asked you if you had had any controversies with the Federal Government pertaining to taxes.

Juror: I told you I had.

The Court: You said you had difficulty, but it was all thrashed out and settled.

Juror: Any controversy is thrashed out.

The Court: Well, I want to say to you that I do not think you made a full, fair statement to this Court and you are excused from this jury. You are excused for the present. You may stand aside.

Mr. Graff: If the Court please.

The Court: Mr. Graff, you may make your statement. Make your record.

Mr. Graff: I want to make my objection in the record. I assume that I can make it in open court since the jury is gone.

The Court: I assume that is true. I sometimes assume things in court and find I am mistaken. You may take it at the Bench if you desire, Mr. Graff.

Mr. Graff: Beg pardon?

The Court: You may make it at the Bench in the hearing of the Court.

Mr. Graff: At this time, if the Court please, the defendant wishes to object to what has transpired here this morning. May the record show that counsel for the Government has handed the Court a file, which file I presume is from the Bureau of Internal Revenue, which file the Court examined and read and which file—the Court asked Mr. Baumann whether he had signed a certain letter which apparently was on top of the file. If the Court please, this juror was accepted yesterday by the Court and by counsel on both sides. I have never seen this juror before in my life and I know nothing about him, except what was disclosed by the Court's interrogation of him yesterday.

It is apparent to me, and it must be apparent that what has transpired is either one or two things, or both. And let me speak frankly so there will be no question about it in the record. Either the Government people have had this list of prospective jurors and have checked the tax rolls to see whether any of these jurors have been involved in any particular kind of tax difficulties, or following the selection of this jury yesterday, a check was made of the particular individuals on this jury to determine whether there were any tax difficulties. It is impossible to conceive of how this particular file on this individual should be in the hands of counsel for the Government this morning unless that took place.

We believe that on the basis of the selection of this man as a juror yesterday, we have a right to this man on this jury. He was selected by the Court, counsel for both sides, and sworn in, and we believe that it is error to summarily bring this man before this Court, and if the Court please, to intimidate the entire jury panel by the procedure which has been followed. Taxpayers have a right, if the Court please, to contest their difficulties with the Bureau of Internal Revenue. The Bureau of Internal is not always correct, and every taxpayer has a right to contest his difficulties. I do not know anything about Mr. Baumann's troubles, but I would be the last person to say that he did not have the right to litigate whatever his difficulties are with the Bureau of Internal Revenue and to summarily dismiss him from the Jury, I think, is such error and creates such prejudice that it is absolutely incumbent that the Court declare a mistrial of this case at this time, and we so move.

The Court: The motion is overruled.

Mr. Graff: May an exception be allowed.

The Court: The officers of this Court were instructed in no uncertain language not to give out a list of jurors when

drawn for a term of this court. I have confidence in the officers and have no doubt but what they complied with the direction of the Court and the rule of the Court. Now, the jury was excused from this jury room when the matters pertaining to this juror, Baumann, were mentioned audibly. They have no knowledge—I suppose they have no knowledge of what has occurred and there is no reason for declaring a mistrial of this case. This trial may proceed forward before the jury, an alternate will be substituted for this juror who has been excused. The Court would be derelict indeed in not excusing a juror who had not been full and frank with the Court in disclosing his tax situation and whether he had any tax difficulties with the Government. Now, of course, he has got a right to defend in tax matters. He has got a right to refuse to pay taxes until it is known that he is indebted to the Government or the State for taxes, until he owes taxes. There is not any question about that.

Now, this is not a matter of recent occurrence. Obviously he has had difficulty down at the Internal Revenue Department for four or five years and on August 28, 1950, wrote a letter to the Collector of Internal Revenue about these tax difficulties that he has had. Well, his statements, I believe, were not frank with the Court and he did not furnish the Court the facts truthfully and that is why he is excused from this jury. This Court does not try cases with jurors who have not been perfectly frank, if this Court knows it. That is the reason why the Court has excused this juror but that does not mean that an alternate may not be substituted in his place and that will be done and this trial will proceed.

Mr. Graff: May the record show, Your Honor, that the defendant objects to the substitution of the alternate for the juror which the Court has now excused, in view of the circumstances disclosed by the record. Thank you.

The Court: Very well, the officers will bring in the jury.

Mr. Landrum: Could I approach the Bench, Your Honor, to get that file?

The Court: Very well.

Mr. Graff: If the Court please, before the jury is recalled, if I recall the admonition given by the Court to this jury yesterday, the Court said nothing about the reading of newspapers, listening to the radio broadcasts, or TV, watching TV.

The Court: I will just say this, Mr. Graff, it may cut it short. I have instructed the officers in charge of this jury to delete any matter in the newspapers about this trial and to not permit this jury to listen to radio broadcasts or observe what is transpiring on television unless they are very sure that they turn on to a program that does not contain anything in regard to this trial. The Court is using every effort at its command to see that this case is fairly and properly tried and hopes to be able to accomplish that very thing.

Bring in the jury. The jurors may be brought into court, Mr. Bailiff.

(Thereupon the jury returned to the court room and the following proceedings were had.)

The Court: Alternate Robert G. Larson will occupy the position first occupied by Alice F. Pfeiffer, who has been excused for reasons the Court deemed justifiable.

Mr. Milton W. Baumann has been excused and his place on the jury will be occupied by Mr. Frank P. Paddock.

Counsel may proceed.

Mr. Landrum: May it please the Court.

The Court: Mr. Landrum.

Mr. Landrum: Gentlemen of this jury, counsel, as a representative of the Government of the United States, it

is now my purpose to make what we call the opening statement in this case on behalf of the Government. Of course, I suppose you all know now that my name is Landrum. I am a Special Assistant to the United States Attorney for the District of Minnesota. In the beginning may I not say to you that we feel that this case may be somewhat disinteresting for you, that it may appear in the beginning to be what we may call a jumbled mess, but may I give you just a little comfort in that regard and say to you that I am sure that it shall be the effort of both sides to keep it just as clear and just as plain for you as it is possible.

As you know, the procedure will be, the Government will go ahead with its side of the case. We will endeavor to present to you the testimony which we feel will be proper in this case. It may be a little long drawn out and disinteresting in the beginning, but we shall, we hope, be able to in the end bring it all together for you so that it will be plain, clear, and concise.

And may I not also say to you gentlemen, it is not any pleasure to any of us to be here, none of us, but this is a matter of importance. It is a matter of importance to the people of the United States and to this defendant, and I say here and now, and I say in all humility and sincerity, that insofar as the Government of the United States is concerned we shall bring to you the evidence which we have discovered, every scintilla of it, and we shall know and we shall feel then that our duty has been performed, and we will pass the burden on to you.

This action, as you know, is one against Mr. Thomas W. Banks wherein he is charged, as his Honor has told you, under an indictment returned by a Grand Jury in this District with having attempted to evade and avoid the payment of certain income taxes. With the hope that it will not be burdensome to you, but with the sincere thought that it may be some help to you, I want to read you the indict-

ments, or the indictment—if counsel has any objection, I won't do it.

Mr. Graff: If the Court please, at this time we object to the reading of the indictment to the members of the jury on the ground that it is highly improper.

Mr. Landrum: Well, I would like for the Court to rule on that.

The Court: The objection is overruled.

Mr. Graff: May an exception be noted?

The Court: An exception may be noted.

Mr. Landrum: Gentlemen of this jury: His Honor, having ruled that I might be permitted to read this indictment, I am now going to read it from one end to the other, but inasmuch as what I have is only a copy, might I ask the Court to permit me to have the original from the file?

"United States District Court, District of Minnesota, Third Division, Criminal No. 7446. United States of America versus Thomas W. Banks, Indictment (26 USCA, Section 145) (b).

"The Grand Jury Charges:

"On or about the 15th day of January, 1946, in the City of St. Paul, Ramsey County, State and District of Minnesota, one.

"THOMAS W. BANKS,

late of Minneapolis, Hennepin County, Minnesota, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1945, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collector District of Minnesota, at the City of St. Paul, Ramsey County, Minnesota, a false

and fraudulent income tax return, wherein he stated that his net income for said calendar year was the sum of $20,170.11, and that the amount of tax due and owing thereon was the sum of $7,675.27; whereas, as he then and there well knew, his net income for said calendar year was the sum of $55,363.21, upon which said net income he owed to the United States of America an income tax of $31,454.61; in violation of Section 145 (b), Internal Revenue Code; 26 U. S. C. A., Sec. 145 (b).

"SECOND COUNT"

(26 USCA 145 (b))

"The Grand Jury charges that on or about the 15th day of March, 1947, in the City of St. Paul, County of Ramsey, State and District of Minnesota, aforesaid, one

"THOMAS W. BANKS,

the identical person named in the foregoing Count of this Indictment, did willfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Minnesota, at the City of St. Paul, Ramsey County, Minnesota a false and fraudulent income tax return, wherein he stated that his net income for said calendar year was the sum of $27,100.99, and that the amount of tax due and owing thereon was the sum of $10,556.98; whereas, as he then and there well knew, his net income for said calendar year was the sum of $39,275.07, upon which said net income he owed to the United States of America an income tax of $17,942.34; in violation of Section 145 (b), Internal Revenue Code; 26 U. S. C. A., Sec. 145 (b).

"THIRD COUNT

(26 USCA 145 (b))

"The Grand Jury charges that on or about the 15th day of March, 1948, in the City of St. Paul, County of Ramsey, State and District of Minnesota, aforesaid, one

"THOMAS W. BANKS,

the identical person named in the First County of this Indictment, did willfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1947, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Minnesota, at the City of St. Paul, Ramsey County, Minnesota, a false and fraudulent income tax return, wherein he stated that his net income for said calendar year was the sum of $20,609.29, and that the amount of tax due and owing thereon was the sum of $6,955.29, and that the amount of tax due and owing thereon was the sum of $6,955.14; whereas, as he then and there well knew, his net income for said calendar year was the sum of $39.542.14, upon which said net income he owed to the United States of America an income tax of $17,817.24; in violation of Section 145 (b), Internal Revenue Code; 26 U. S. C. A., Sec. 145 (b).

"A TRUE BILL. Signed C. U. Landrum, United States Attorney. Robert Albrecht, Foreman."

THE COURT: Gentlemen of the Jury, I think I should charge you at this time that the indictment is not evidence against the defendant in this case. It is a formal charge returned by the Grand Jury and filed in this Court and merely constitutes the legal and proper method of bringing the defendant to trial. You may proceed, Mr. Landrum.

Mr. Landrum: Yes, Your Honor.

Now, gentlemen of the jury, as I said to you, in order that you may have as good an understanding as I am able to give you with relation to what the Government proposes to prove in this case, I desire to say to you that we will present from that witness stand witnesses who will testify with relation to the beginning of the investigation which brings us here today. We will present Mr. George McKusick, who will tell you that he is a Special Agent of the Intelligence Bureau of the—of the Intelligence Unit of the Bureau of Internal Revenue. He will tell you that he was specially assigned to begin this investigation, I think sometime in February, 1946. There will be at the same time and prior to Mr. McKusick, one of two Special Agents of the Bureau of Internal Revenue who will tell you that they, too, began an investigation about 1946 for the purpose of determining whether or not Mr. Thomas W. Banks had attempted to evade a substantial portion of his income taxes. They will tell you that they interviewed Mr. Banks. They will tell you that they interviewed his accountant, Mr. Weinstock. They will tell you that they interviewed and talked with attorneys and gentlemen who held a power of attorney for Mr. Banks. They will tell you that at that time they called upon Mr. Banks and upon his accountant for books, records, cancelled checks, and statements, which they might use in connection and for their use in making this investigation. They will tell you that they were not furnished adequate books. They will tell you that they were not furnished adequate bank statements. They will tell you that they were not furnished cancelled checks. They will tell you that they inquired as to whether or not Mr. Banks had any central control books of his own wherein and where by they might arrive at some conclusion with relation to the tax which he should have paid, and that they were informed that he had no central control books. They will tell you that their investigation brought out the fact that a large share of Mr.

Banks' income came to him through what we term "wagering", or gambling.

They will tell you that in their investigation they found sources from which he might derive an income, and having been faced with that situation, they will tell you that they then proceeded in this case, under what we call the net worth method.

Now, I am sure that both sides in this case will agree that the net worth method is no bugbear and it is no bugaboo. And pursuant to that investigation, which, as we say we will bring witnesses here to show you, started in 1946 and it winds up now, gentlemen of this jury, you and I are here.

Now, this net worth business, as I said to you, these witnesses will testify that they were unable to find adequate books. They will testify that their investigation disclosed to them assets which had not been shown in Mr. Banks' income tax returns, and they will tell you that in their search they found possible sources of income, and net worth means exactly what the words imply, "Net worth" is simply the difference between a man's assets and his liabilities. In that case, the Government will present to you what we call in the legal term a beginning point, and having that beginning point, which the Court will present to you, from there on it was simply a proposition of determining how much money Mr. Banks had at the beginning of the year and how much he had at the end of the year, taking his assets and deducting his liabilities and comparing the answer that you got with his income tax return for that year.

Now, that is as simple as I can put it to you. The Government will present to you an affidavit which Mr. Banks filed with the Government of the United States under date of July 2, 1937, wherein and whereby in connection with the compromise of a matter pending before the Alcohol Tax Unit, Mr. Banks, under oath, stated that he was insolvent. In that

affidavit he stated certain properties which he owned and certain properties which his wife owned. That is what we call the beginning point. That affidavit by Mr. Banks himself is the beginning point. An investigation was made with relation to the assets which Mr. Banks stated in that affidavit he owned and although he himself stated that he was insolvent, I think the witnesses for the Government of the United States, upon this witness stand, will tell you that they gave him credit at that time for not being insolvent, and started him off with assets—now, forgive me, I do not intend to misquote anything, and I do not intend to do anybody any wrong in the trial of this case; I have a duty. I think they gave him credit for $18,000.00.

That will be developed. In any event we have a starting point, that affidavit.

Now, it will be presented to you here in evidence on that stand that in the fall of 1950, I believe it was, Mr. George McKusick, who as the Special Agent that I mentioned to you a few moments ago, presented to Mr. O'Gordon, after conferences with Mr. O'Gordon, Mr. O'Gordon holding a power of attorney for Mr. Banks, Mr. McKusick presented to Mr. O'Gordon a list of questions which Mr. O'Gordon agreed that he would present to Mr. Banks for Mr. Banks' answer. Mr. McKusick presented that list of questions to Mr. O'Gordon. Mr. O'Gordon will come here. He is under subpoena by the Government of the United States. He will tell you that he got that list of questions from Mr. McKusick and that he went to Mr. Weinstock, who was Mr. Banks' accountant, and that he and Banks and Weinstock sat down together and answered practically all of those questions, and we hope to be able to present to you from this witness stand the answers that were given by Mr. Banks to Mr. O'Gordon and Mr. Weinstock for delivery to the Government of the United States.

In other words, we will present the list of questions which

Mr. McKusick presented to him, I believe in November, 1950, and we will present the answers which I believe the testimony will show came back in February, 1951, some three months after they had received them.

Now, in that statement there is this statement, and the Government of the United States in the trial of this case believes it will be able to present testimony which will show that insofar as the property is concerned, the property of Rita Banks was the property of Thomas Banks and acquired through and from him. In this question and answer statement, one question was presented with relation to whether or not Rita Banks stood separate and alone, and Mr. Thomas Banks in that statement made through Mr. O'Gordon and delivered to the Government through him said, "Rita Banks' assets acquired from Thomas Banks."

Now, in addition to that statement, as you know, in order that we may properly present this matter, it will be necessary for us to give to you in evidence in this case the income tax returns of Mrs. Banks and of Mr. Banks through these years. Mr. Banks in his own income tax returns took credit for taxes paid on their home, which I believe was in joint tenancy. In other words, Banks in his own income tax returns took credit for the taxes paid on the home which was either in Rita Banks' name alone, or was in joint tenancy.

Mr. Banks in his own income tax returns, which will be in evidence here, included the income from a place on Beard Avenue which was in the name of Rita Banks. Mr. Banks in this affidavit of July 2, 1937, recited that his wife, Mrs. Rita Banks, owned certain stock in the Realty Service Company, but in his own income tax returns, he took the capital loss on these stocks himself, although they were standing in the name of Rita Banks.

Mr. Banks, from his own returns, took the profit or loss on a farm, which you will learn to know as the Anoka Farm.

Banks himself in his own income tax returns, and I believe the defense will show that it was operated largely and most of the time at a loss, he deducted that loss from his own income tax returns even though the farm was in Mrs. Banks' name.

So it is the position of the Government that, of course, what is hers was his and what is his was hers and they are one and the same, a man and his wife.

In connection with this so-called net worth procedure, we will present to you witnesses from five different banks, at least, who will give to you their records with relation to the bank balances from time to time of Mr. and Mrs. Banks.

We will present to you certain file copies of the Government bonds which were owned by Mr. Banks or Mrs. Banks, or by one or the other of them, or jointly.

We will present to you certain file copies of numerous deeds which they received from time to time, wherein and whereby there was conveyed to them title to real property. We will present witnesses on this stand to show receivables that Thomas Banks got from many sources. We will bring to this witness stand witnesses who will tell you of his investment and Mrs. Banks' investment in stocks and bonds. We will bring witnesses to show investments in many operated companies. We will bring witnesses to show the extent of what he owed. We will bring witnesses here to show the mortgages which was against the different properties which he owned. We will show loans made and the accounts payable which he had.

We will bring here witnesses to show what transpired at conferences with Banks and with his accountant, Mr. Weinstock, and Mr. Weinstock will be presented on this witness stand as a witness for the Government. The Government has subpoenaed him and I trust he will be here.

The situation is that we expect to present from that

witness stand evidence that Thomas W. Banks wilfully failed to report a substantial part of his income for the years 1945, 1946, and 1947.

We will show what he said in his income tax statements was his income, and then we will present witnesses to show how much his wealth increased during that particular year that he made that income tax return, and to put it in a gereral way, for you and just as plain as I possibly can, and in general figures it will run something like this: For the year 1945, Mr. Banks' figures himself in his income tax return approximately $20,000.00. The Government figures, or what his actual income was that year, was $55,000. Then the income not reported would be approximately $35,000. I am giving it to you in round figures. I may be a hundred dollars or two hundred dollars off either way.

In 1946 Mr. Banks, in round figures, said $27,000.00. The Government, in round figures said $39,000.00. The difference in round figures is about $12,000.00.

In 1947 Mr. Banks said $20,000.00, the Government said $39,000.00, and the income tax not reported is between eighteen and nineteen thousand, according to those figures.

We shall undertake to bring to you every single scintilla of evidence that we have been able to uncover,

When we have presented that to you, the defendant will follow and present to you the defense that he has in this case. You will, of course, perform your duty under the oath that you took and when you have done that, your greatest recompense is going to be a consciousness of a duty performed.

I thank you.

ELMER P. HANSON, called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

My name is Elmer P. Hanson and I live at 1500 West Minnehaha, St. Paul, Minnesota. I have lived in St. Paul for 34 years. I am a Deputy Collector or Administrative Assistant of Internal Revenue for the District of Minnesota and I have held such office for 34 years. My office is located in the new Post Office Building in St. Paul. I am the official who has charge of the file and returns of income taxes paid within the District of Minnesota, and I have brought certain income tax returns into this Court room for use in the trial of this case. The following government exhibits are identified as follows:

Exhibit 1—1937 Individual Income Tax Return of T. W. Banks

Exhibit 2—1938 Individual Income Tax Return of T. W. Banks

Exhibit 3—1939 Individual Income Tax Return of T. W. Banks

Exhibit 4—1940 Individual Income Tax Return of T. W. Banks

Exhibit 5—1941 Individual Income Tax Return of T. W. Banks

Exhibit 6—1942 Individual Income Tax Return of T. W. Banks

Exhibit 7—1943 Individual Income Tax Return of T. W. Banks

Exhibit 8—1944 Individual Income Tax Return of T. W. Banks

Exhibit 9—1945 Individual Income Tax Return of T. W. Banks

Exhibit 10—1946 Individual Income Tax Return of T. W. Banks

Exhibit 11—1947 Individual Income Tax Return of T. W. Banks

Exhibit 12—1948 Individual Income Tax Return filed under the name of T. W. and Rita Banks signed by Thomas W. Banks and signed by Rita Banks.

Exhibit 13—1949 Individual Income Tax Return filed under the name of T. W. and Rita Banks signed by Thomas W. Banks and signed by Rita Banks.

Exhibit 14—1950 Individual Income Tax Return under the name of T. W. and Rita Banks signed by Thomas W. Banks.

Exhibit 15—1951 Individual Income Tax Return filed under the name of T. W. and Rita Banks signed by Thomas W. Banks and signed by Rita Banks.

Exhibit 16—1942 Individual Income Tax Return of Rita Banks.

Exhibit 17—1943 Individual income and victory tax return of Rita Banks.

Exhibit 18—1944 Individual Income Tax Return of Rita Banks.

Exhibit 19—1945 Individual Income Tax Return of Rita Banks.

Exhibit 20—1946 Individual Income Tax Return of Rita Banks.

Exhibit 21—1947 Individual Income Tax Return of Rita Banks.

Exhibit 22—Partnership Return of Income for the fiscal year ending March 31, 1947 for the Tenth Street Realty Company signed by T. W. Banks.

Exhibit 23—Partnership Return of Income for the fiscal year ending March 31, 1948, for the Tenth Street Realty Company.

Exhibit 24—1944 Partnership Return of Banks and Shepherd.

Exhibit 25—1945 Partnership Return of Banks and Shepherd.

Exhibit 26—1946 Partnership Return of Mrs. Rita L. Banks and Harry Shepherd.

Exhibit 27—1947 Partnership Return of Mrs. Rita Banks and Harry Shepherd.

Exhibit 28—1944 Partnership Return of Coin-A-Matic Amusement Company.

Exhibit 29—1945 Partnership Return of Coin-A-Matic Amusement Company.

Exhibit 30—1946 Partnership Return of Coin-A-Matic Amusement Company.

Exhibit 31—1947 Partnership Return of Coin-A-Matic Amusement Company.

Exhibit 32—1947 Partnership Return of Banks, Cary, Shepherd and Bortz.

Exhibits 1 to 32 inclusive are offered in evidence.

Q. (By Mr. Landrum.) Do you know, Mr. Hanson, whether or not Rita Banks, or Rita L. Banks, filed any income tax returns prior to the year 1942?

Mr. Graff: Just a moment. Objected to as immaterial.

The Court: (To the witness.) You may answer.

A. Yes.

Q. (By Mr. Landrum.) Did she file any prior to 1942?

A. I think not.

CROSS EXAMINATION

There are included certain papers such as powers of at-

torneys, agreements to extend the statute of limitations in some of the exhibits numbered 1 to 32 that were not with the tax returns when they were filed. Certain checks, marks and stamps were likewise not on exhibits numbered 1 to 32 when such tax returns were filed.

Mr. Graff: Now, if the Court please, with respect to Exhibits numbered 1 to 15, inclusive, objection is made because the exhibits include documents other than the tax return of this taxpayer. Now, I assume that those documents can be eliminated from those particular exhibits. Assuming that those particular exhibits have eliminated from them the extraneous documents, then there is no objection on the part of the defendant to Government's Exhibits 9, 10 and 11, provided it is understood that the marks and documents which were put upon them were put on them after the return was filed by the taxpayer.

Now, with respect to Exhibits 1, 2, 3, 4, 5, 6, 7 and 8, which represent the returns for the period '37 to '44, inclusive, they are objected to at this time on the ground and for the reason that they are incompetent and immaterial. Now, it may be that at a later date the Government may be able to tie them up, but certainly at this point of the lawsuit they are immaterial.

Now, with respect to Exhibit 12, 13, 14 and 15, other than the objection and observation that I have already made, these represent the returns of the taxpayer for the period '48 to '51 and they are objected to on the ground and for the reason that they are entirely incompetent and immaterial with respect to the issues.

Mr. Graff: Now, if the Court please, with respect to any return where there are papers included or attached to the return which were not on the return when it was filed, objection is made to the exhibit because of that fact. Assuming that those papers are going to be removed, our objection

to Exhibit 16, 17, 18, 19, 20 and 21, being tax returns of Rita Banks,—they are objected to because they are incompetent and immaterial at this time. It may be that later on they may become material, but I think at this time they are immaterial to any issues involved in this lawsuit and they are objected to for that reason.

Exhibits 22 and 23, being tax returns for the years '46 and '47 of the 10th Street Realty Company,— there is no objection to those, with the understanding, of course, that the marks that were put on them were put on them after the returns were filed.

With respect to Exhibits 24 and 25, being returns of Banks and Shepard, Exhibit 24 is objected to on the ground that at the present time, that being a '44 return, it is immaterial to the issues involved in this lawsuit. There is no objecton to Exhibit 25, which is the tax return for the year 1945, provided it is understood that the marks and figures that are on the return were put on after the return was filed.

As to Government's Exhibits 26 and 27, representing partnership returns of income of Mrs. Banks and Harry Shepard are objected to for the reason and on the ground that they are incompetent and irrelevant to the issues involved in this lawsuit at this time. It may be that at a later date they may become material, but we think at this point they are not material.

With respect to Exhibit No. 28, being the '44 return of the Coin-A-Matic Company, that is objected to at this time because it is deemed to be immaterial and irrelevant to the issues involved in the lawsuit at this point.

As to Exhibits 29, 30 and 31, they are the exhibits of the Coin-A-Matic Company for the years '45, '46, and '47. There is no objection to the reception into evidence of these three exhibits, provided it is understood that the marks, stamps

and so forth which were put on the exhibits were put on them after they were filed with the Collector's Office.

With respect to Exhibit 32, which is the '47 tax return of Banks, Cary, Shepherd and Bortz, there is no objection to that exhibit provided it is understood that the exhibit when received by the Collector's office did not have the marks and exhibits upon them, and there is removed from it a sheet which is attached to it, which this witness says was not on the return when it was filed in the Collector's office.

The Court: Has the Government the evidence to connect these exhibits,—make them competent?

Mr. Landrum: Of course, Your Honor, we do in our opinion. Now, with relation to these matters which are within those exhibits, about which we knew nothing when we brought them into this court room, they are offered here as official Government records and documents. We would be very happy, however, to remove from them the other documents which counsel has objected to. With relation to his objection upon the ground and for the reason that some clerks down in the Internal Revenue Office have made some checks on it, I understand that he says that he doesn't object to that providing we agree that they were put on there after the returns reached the Office of the Collector of Internal Revenue. We are perfectly willing to agree to that, with the exception of what I understand to be something which is on one particular return.

The Court: Do you know which one that is?

Mr. Landrum: I think it is the 1945 return on Thomas W. Banks.

Mr. Graff: If the Court please, my statement was that I had no objection to certain exhibits in evidence provided it was understood that these things were put on after the returns were filed. I did not ask anybody to agree to it,—just with that understanding.

Mr. Landrum: Yes. Well, we will agree to it except that on the 1945 return there is one stamp on there that I am a little captious about just when it was put on, Your Honor.

Mr. Graff: Let's look at it—

The Court: Perhaps you can settle that controversy right now.

Mr. Landrum: The notation to which I refer is upon Government's Exhibit 9, and it is the notation which says, "Received, January 15, 1948, Collector of Internal Revenue, District of Minnesota." Will you state, Mr. Witness, just what that stamp that I just read means?

Mr. Graff: I supposses that it speaks for itself as far as the record is concerned. I have no objection to having him explain the practice, if he is familiar with it.

The Court: (To the witness) You may make an explanation of the purpose for which that stamp is used,— why it appears on that exhibit.

The Witness: Well, we have two stamps down in our office. One, when a return is received in the office without a remittance, then it has got just a "Received" stamp on it. When it has a check or a remittance accompanying the return, then we put on it "Received with Remittance". That is the difference.

Q. (By Mr. Landrum) Well, what is that one, that stamp (indicating)?

A. This is a "Received"—just "Received on January 18th of 1948."

Q. You say it is the 18th?

A. It could be the 15th.

Q. Yes, it could be. Look at it carefully.

(Witness checks exhibit.)

A. It is stamped right over some printing. When I first

looked at it, it could be an "8", but now it looks like it is a "5".

Q. It is a "5", isn't it?

A. It looks very much—

Mr. Graff: I suppose that it will speak for itself.

Mr. Landrum: Yes, I will let it speak for itself.

Mr. Graff: All right.

The Witness: It looks more like a "5". It has got a little curve like a "5" would be there (indicating).

Mr. Landrum: All right.

Mr. Graff: Well now, just a moment. Is there any question that that stamp was put on after the return was filed by someone in the Bureau of Internal Revenue? Is there any question about that?

The Witness: It would have to be put on in the Office of the Collector of Internal Revenue. There is no question about that.

Mr. Graff: Yes. That is the only thing. We will argue later what it says.

Mr. Landrum: Your Honor, I think you will know the reason that I am a little captious about that.

The Witness: That is a "5". I think that is a very plain "5".

Mr. Graff: Well, just a moment.

(Government's Exhibit 9 handed to the Court.)

(Exhibit returned to Mr. Landrum.)

Q. (By Mr. Landrum.) Just one further question. Mr. Witness, I don't want to ask you something you can't answer, but is there anything shown in that Exhibit 9 which indicates the date upon which it was filed in the Office of the

Collector of Internal Revenue for the District of Minnesota?

Mr. Graff: That is objected to as improper redirect examination, —not in the course of the direct examination, and nothing having been covered on it in cross-examination.

Mr. Landrum: If Your Honor please, I ask to be permitted to ask the question.

The Court: Read that question, Mr. Reporter.

(The question was read.)

The Court: (To the witness.) You may answer.

A. I will have to answer that it was received January 15, 1946.

Mr. Landrum: Thank you, sir. We will be very happy to agree to remove from those exhibits all of those powers of attorney, and anything, if Your Honor please, that wasn't with them when they were filed in the Office of the Collector of Internal Revenue.

By Mr. Graff:

Q. Mr. Hanson, will you plase tell us what the practice is when returns are received in the Collector's Office with respect to their coming in by mail, let us say,—did they go to a mail room first, or what is done?

A. That is right, we have a mailing room, yes.

Q. I see, and someone in the mail room takes them and stamps them?

A. That is right.

Q. And are they necessarily stamped on the day that they are received?

A. Practically always we open all the mail that we get, open them the same day. We try to.

Q. Yes. Now, when you come to March 15th—

Mr. Landrum: This is January 15th.

Q. (By Mr. Graff) When you come to March 15th, Mr. Hanson, you have a lot of returns in your office, do you not?

A. Lots of them.

Q. Yes. Isn't it the practice in the Collector's Office at St. Paul, Minnesota to take all the returns that are in by a certain date and then stamp them later, because it is a physical impossibility to stamp them at the time?

A. That Could be.

Q. There is no question about it, is there? Doesn't that happen every year?

A. I am not in that division.

Q. You are not in that division. So you are not familiar with the practice that is followed down there with respect to stamping returns, is that correct?

A. That is correct.

Q. Who is the person that is in charge of that division?

A. Carl Giere, the cashier.

Q. Giere is the cashier,—correct?

A. That is correct.

Q. And is the mail room under his supervision?

A. That is correct.

Mr. Graff: In connection with the objections that were made, Your Honor, I would like to point out as to certain of the exhibits, that as to any returns for years beyond 1947, they could not possibly be material to the case here and I want to add that to the objection that I have already made.

The Court: Do you contend that the returns for 1951 are competent, and other years subsequent—

Mr. Landrum: (Interposing) Yes, Your Honor, they contain matters which we will connect up with the years with which we are concerned.

Mr. Graff: May I suggest, Your Honor, in view of the statement of counsel that the Court not rule on that unless and until that time comes.

The Court: I will withhold my ruling for further testimony in regard to these exhibits.

Mr. Landrum: Do you mean all of them, Your Honor, or just subsequent to—

The Court: Well, as to a large number, no objection was made.

Mr. Graff: That is right, Your Honor. There were certain ones as to which no objection was made. Those are the returns for the three years involved in the offense charged.

The Court: There is no objection to Exhibits 1 to 8, inclusive?

Mr. Graff: Oh, yes, 1 to 8, inclusive, are objected to. Those are the returns for '37 to '44?

The Court: That is correct.

Mr. Graff: We contend that they are certainly immaterial at this stage of the game. There is no objection to 9, 10 and 11, provided that those papers are removed.

The Court: I understand that they will be removed and not offered in evidence, that is, the powers of attorneys in these three exhibits mentioned.

Mr. Landrum: That is correct, Your Honor. If Your Honor has any question at all about the admissibility of those in the prior years, I would like to be heard if there is any question in Your Honor's mind.

The Court: I will not rule on them at this moment. There were some other exhibits to which objection was not made.

Mr. Graff: That is right, Your Honor.

Mr. Hoffmann: 22 and 23—

The Court: I think that is correct.

The Clerk: Also 25, 29, 30, 31, and 32.

The Court: There was no objection to 24 and 25, as I remember it, is that correct?

Mr. Graff: There is objection to 24, Your Honor.

The Court: But not to 25?

Mr. Graff: But not to 25.

The Court: I will withhold my ruling on the admission of those exhibits. You may proceed.

Proceedings had in the foregoing entitled matter before the Honorable Robert C. Bell on May 21, 1952. Appearances are as has been heretofore noted.

The Court: Exhibits 1 to 32, inclusive, are received.

I believe there was no objection to 33. 33 is received.

Mr. Graff: If the Court please, there was an objection to 33 on the ground of its irrelevancy and its immateriality. There was no objection to it as being part of a file that was apparently in the possession of the Government.

The Court: Very well. The exhibit is received.

HOWARD W. MELBOSTAD called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I am 40 years of age and am employed as an Internal Revenue Agent in the Minneapolis office of the Internal Revenue Agent in Charge, St. Paul. I reside at 1472 West Larpenteur Avenue, St. Paul and have been employed in the position I now hold since the Fall of 1937 except for a period from April, 1942 to February, 1946 when I was in military service. I graduated from the University of Minnesota in 1935 with an accounting major and a degree from the business school. After graduation I was engaged in accounting work until I started working for the government.

The income tax returns filed by Thomas W. Banks were assigned to me for examination in October or November of 1946. The first thing that I did was to analyze the tax returns and I decided that they should be examined and income deductions verified. The examination was made by me jointly with another Revenue Agent, Thomas McCart. We had one interview with Mr. Banks in the office of his attorney at that time, Mr. Meshbesher. We asked Mr. Banks questions about his 1941, 1942 and 1943 returns seeking explanations of items on the returns. We did not receive any definite information that was of any value to us. We asked him specific questions about various items on the returns and I do not recall receiving any answers to them other than to be referred to the accountant, Mr. Weinstock or to Mr. Meshbesher to obtain the answers in the future. We did go to these people to get the answers but we did not get any answers. I asked Mr. Banks if he had any personal books and all I recall is that he referred me to his accountant and said that the accountant would have any records that were available. The accountant did not show me any personal control books covering the activities of Thomas W. Banks and I did ask him for such books. The accountant was Mr. Weinstock.

Cross Examination

The conference that I am speaking of took place in the office of Mr. Meshbesher in Minneapolis. I asked for the opportunity of speaking to Mr. Banks and in response to my request, the meeting was arranged. I do not recall Mr. Banks telling me and Mr. McCart that as far as he was concerned there was not any tax that he owed. I kept no record of the conversation and I am testifying here upon my recollection of what happened at that time. Mr. Banks did tell us to see Mr. Weinstock as Mr. Weinstock had whatever books and records were available. I kept no notes of the conference. I have a diary but I have not checked my

diary and I do not have the diary with me. I have not used any diary to refresh my recollection as to this particular conference. I do not keep a very accurate diary. It is not required. I could bring my diary into Court. I did not make any official report and I did not regard the conference as being of sufficient consequence to make any report. To my knowledge Mr. McCart did not make a report of this conference. Shortly after my conference with Mr. Banks I quit working on this case. I do not recall whether Mr. Banks told me and Mr. McCart that if he owed any taxes he would be glad to pay them.

Q. (By Mr. Graff) Well, would you be back in court and bring with you your diary so that we may see what kind of an examination or report you made at that time?

Mr. Landrum: If the Court please, we are just beginning this trial and I do not like to be captious, but we are bringing one witness back, the first man on here. Now, we are bringing another witness back and I wonder when we are going to get through with the cross-examinations.

The Court: Well, I think it is proper for the witness to return at 2 o'clock and return to the stand if he is called. Are you through at this time?

Q. (By Mr. Graff) This is the year 1946, Mr. Melbostad?

A. Yes.

Q. And may I ask what years you were checking for? The returns for what years?

A. That was 1941, '42 and '43.

Q. I see. Would you also check during the noon hour to see what report, if any, you made at that time?

A. Yes.

Q. And bring it with you.

Mr. Lord: If the Court please, before recess, it was my understanding that Counsel was not finished with his examination of Howard Melbostad. He was supposed to return here with his diary. I believe it would be in order at

this time for Mr. Melbostad to take the stand and have Counsel finish examining him.

The Court: He may come forward.

Whereupon, HOWARD W. MELBOSTAD was recalled as a witness and, having previously been duly sworn, testified further as follows:

Cross-Examination (Continued)

By Mr. Graff:

Q. Mr. Melbostad, it is my recollection that you were to check and see whether you had a diary reflecting what happened and when it was that you were at Mr. Meshbesher's office, is that correct?

A. Yes.

Q. Did you find the diary?

A. I went back to Minneapolis and got the diary but in examining it, I do not find there is any notation in it. This is just an appointment book is all it is.

Q. I think you will have to speak so people can hear you.

A. I say this is merely an appointment book. That is the only type of a diary I ever keep.

Q. I see.

A. And there is nothing in it about that conference with Mr. Banks.

Q. May I see it a moment, please?

Mr. Lord: If the Court please, the witness has not testified from the diary and I do not think it is in order for Counsel to have it.

The Court: It is not in evidence yet.

Mr. Graff: He has used it, Your Honor, for the purpose of refreshing his recollection with respect to it and under the circumstances, I think I am entitled to cross examine him concerning it if I should wish to do so.

The Court: The objection is sustained. I think we will

not go into that unless it becomes more material and more important than it is at this time. He has looked at it to see whether or not he made a certain entry in regard to a matter and found nothing of that kind.

I did not make a report to Mr. Hanson concerning the interview but he may have discussed it with him. There would be no report made but there would be work papers. These work papers would be the combined work papers of myself and Mr. McCart. The work papers were left with the income tax returns when we discontinued work on the case and the entire file was turned over to the other agents. I do not know whether these work papers would be in the possession of Mr. Hanson or not.

Q. Now, Mr. Melbostad, when you were on the stand this morning, a part of the thing that we asked you was to check and see whether there was a report of some documents made by you and Mr. McCart which were filed in the office of Mr. Hanson. Do you remember that?

A. Yes.

Q. Yes. Did you make such examination?

A. To find out if we had made a report on what? I don't understand your question.

Q. Mr. Melbostad, when you were here this morning, we asked you to go to your office in Minneapolis and check and see whether there were any reports. Now, by reports I mean writings that you made as the result of your investigation, together with Mr. McCart, of the taxpayer, Mr. Banks, and you said you would check and see. Do you remember that?

A. I do not recall that. I recall saying I would look for my diary and bring it back and that I did.

Q. Well, I am quite sure that I asked you, Mr. Melbostad. In order that there may be no question about, would you please check now with your office and come back tomorrow and tell us what you find as a result of that check.

Mr. Landrum: If the Court please, I am going to object

to that upon the ground and for the reason that it doesn't make any difference in this case whether he made a report to his office or not, and if he did make it, Counsel certainly would not be entitled to it.

The Court: Well, of course, this witness has said many times that he did not make a report.

Mr. Landrum: That is right.

The Court: That he had some work sheets and turned them in. Now, I think we have devoted about enough time to this phase of the case. That is my idea.

Mr. Graff: Well, I think, Your Honor, if I recall correctly, he said he would check and see at his office whether those papers were there.

The Court: Well, I do not remember of any such understanding. He was to get his diary and check up on some matter.

Mr. Graff: I wonder, may we check with the Reporter and see whether that—

The Court: Oh, we are not going to try to find that in the testimony of this witness that came in earlier in the trial some hours ago. Now, if you can get the Reporter to spend the time to check his notes this evening, you may use them.

GEORGE H. MCKUSICK called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination.

I will be 48 years of age on June 5th of this year. I graduated from high school in 1924 and I then went to work in a wholesale warehouse as an order clerk at Duluth, Minnesota in which work I remained for a little more than a year. Thereafter I went to work as a camp clerk doing timekeeping and accounting for a lumber company in northern Min-

nesota. I started as camp clerk and became auditor and my employment lasted about two and one-half years until August, 1929. Thereafter I went to work for the Clear-Flax Linen Looms as assistant bookkeeper at Duluth, Minnesota in which concern I was promoted progressively until February, 1939 when I became auditor for the concern. As auditor I was in charge of the corporations records, prepared financial statements and was in charge of all inventories. They employed about 175 to 200 employees. When I left their employ I became employed as a general deputy clerk for the Unjust Enrichment Unit of the Bureau of Internal Revenue. Following the invalidation of the agricultural adjustment act, an act was passed taxing processing taxes in the amount of 80 per cent and it was my duty to make the determination of the amount of the tax. I was an auditor for port processors and millers, that is wheat processors. It was my duty to go into the corporate records and reallocate their overhead and taxes and finally arrive at what would be an equitable showing both to the government and the taxpayer. I generally end up with a tax. I did that work for about a year and a half and then on March 15, 1941, I became a special agent in the Intelligence Division of the Treasury Department and I have been so employed since that time. As such special agent we investigate allegations of fraud in income tax matters and make personnel investigations. Most of the tax cases we handle are concerned with allegations of evasions of income tax and I have handled between 50 and 60 cases. I was assigned the tax returns of Thomas W. Banks. I first began the preliminary phase of my investigation on April 2, 1946. I was assigned to work with Harold Lane of Washington, D. C., to ascertain whether complaints that had been received regarding possible payments of graft to city officials had been properly reported for income tax purposes and in that connection other returns were examined. We made inquiries of the Bureau and then obtained all original returns not assigned and then we made contact with the revenue agents who had previously been assigned

in a routine manner. It is doubtful whether Howard Melbostad was contacted or his superiors in order to get the results of their work. We simply retrieved the returns that were out. When it was decided to embark on an investigation by our office, we obtained the returns we wanted from revenue agents who had been assigned them in a routine manner so that they would not close out the return during the period of our investigation. The returns of Thomas W. Banks were among those called in. This was the latter part of 1947.

Q. Now, Mr. McKusick, what did the first phases of your investigation itself involve?

A. Initially we made routine inquiries of the books, that is, the banking houses, the banking houses where Mr. Banks was rumored to have accounts. We found some bank accounts, but they were practically not interesting.

Mr. Graff: Just a moment. I move that that go out as being hearsay as far as this witness is concerned. The records would be the best evidence of that.

The Court: Well, he is stating his own conclusion about what he found. It may remain in the record. It has been given.

Q. (By Mr. Lord.) And what did you next do?

A. We surveyed all of the sources of income on Mr. Banks' return, looking to examination of the income tax liabilities of these various ventures to ascertain whether or not there was any diversion by these ventures whereby Mr. Banks could have received money indirectly.

Mr. Graff: Well now, just a moment. I don't mind this witness telling us what he did, but I don't think it should be infiltrated with his reasons for doing it, which is not competent testimony on the part of this witness.

The Court: Read the last question and answer, Mr. Reporter.

(The question and answer were read.)

The Court: Well, now, that is not stating facts that I think are prejudicial in any way. This witness is merely stating what they did and why they did it. He hasn't stated in any way what was ascertained. You may proceed. The objection is overruled.

After we examined those returns we requisitioned the office file. We then formed in groups; there were about seven or eight special agents who were assigned to this special investigation and these seven or eight special agents were divided into groups of two or three and each one assigned to work a bank. We were given instructions to examine the fronts and backs of every cashier's check, bank money order and certified check which these banks handle. The material obtained by each group was thrown into a pool and correlated and associated with respect to whichever taxpayer it related to. I met Mr. Banks in 1947 at Brady's Bar. The next time I met Mr. Banks was early in 1951. My reasons for contacting him were that we were having some trouble properly correlating the land in connection with the Anoka farm. I called Mr. O'Gordon who was then representing him and then I called Mr. Philip Brancheau through whom Mr. Banks had made some acquisitions of property and I could not locate either one so I called Mr. Banks who told me that either Mr. O'Gordon or Mr. Brancheau would be available the next day. The next time I contacted Mr. Banks was on June 4, 1951. The occasion for that meeting was a meeting which I had requested. It was held in the office of Mr. Weinstock, Mr. Bank's bookkeeper and auditor. Present were Mr. Banks, Mr. Weinstock, Mr. Kleven of the Bureau of Internal Revenue and myself. Mr. Kleven and I had completed the determination of income and I explained to him that there was unreported income and I xplained that in accordance with the Bureau policy he was going to be given at that time an opportunity to explain the differences.

He asked me how much time I had and I explained that Mr. Kleven and I were leaving town and we would be gone about two weeks. In the course of my investigation I did not see any personal books and records of Mr. Banks. I made inquiry concerning such books of Mr. Weinstock who prepares Mr. Banks' income tax returns and is also his bookkeeper-auditor for various of his ventures. I inquired of Mr. Weinstock with reference to checking accounts of Mr. Banks. Mr. Weinstock gave me incomplete checks on the Marquette National Bank account and he gave me some checks on the farm account of the First National Bank of Anoka. All I can recall is that in some years a bank statement or two would be missing and in some cases some of the checks were missing out of some of the statements. The checks given to me on the Anoka bank account were fairly complete; they had to do with the expenditures on the Anoka farm. No other personal records of Mr. Banks were furnished to me by Mr. Weinstock. In the course of my investigation I have seen papers which have been signed by Mr. Banks and I am familiar with his signature. Exhibit No. 33 is offered in compromise which I requisitioned from the miscellaneous tax unit of the Collector's Office in St. Paul. The signature on the last affidavit contained in Exhibit 33 is the signature of Thomas W. Banks. Exhibit No. 33 is offered in evidence.

(The following proceedings were had at the Bench, outside the hearing of the jury:)

Mr. Graff: Did the Court have an opportunity of seeing Exhibit 33 at all?

The Court: Very hastily. I did not read it carefully.

Mr. Graff: I wondered whether, for the purpose of understanding my objection, whether the Court probably should examine it.

The Court: You may make your objection. I think I will remember it substantially.

Mr. Graff: All right: If the Court please, on examination of Government's Exhibit 33 it appears to me to be as follows: The face sheet appears to be a typewritten copy of an offer in compromise, which is not signed, to which are attached, first, a letter, a carbon copy of a letter, apparently written by one F. P. Hensler, as a Deputy Collector, written to the Collector. The third part appears to be a copy of an affidavit of a man by the name of Peter Valder. The fourth part appears to be an affidavit by one Motley Berman. The fifth part appears to be an affidavit by one Abe Brownstien, spelled B-r-o-w-n-s-t-i-e-n. The sixth part appears to be an affidavit by the defendant in this case. The seventh part appears to be an affidavit by one Isadore Blumenfeld. I think these are all copies, but some of them have been signed.

Now, first of all, of course, all the documents in the various parts are objected to on the ground that they are hearsay. The letter from Hensler to the Collector is very clearly hearsay. The affidavits of all of the people with the exception of the defendant are very clearly hearsay. With respect to the affidavit of the defendant, we object to that on the ground of its immateriality, on the ground and for the reason that as to the defendant, the offense charged here is the attempt to evade and conceal a substantial portion of the income tax which should otherwise be paid during the years '45, '46, and '47. This affidavit is dated July 2, 1937, and we contend it's irrelevant and immaterial with respect to the issues involved in this case. Now, with respect to the other portions of this Exhibit, other than the defendant's affidavit, objection is further made in addition to the ground of hearsay that they are entirely immaterial and irrelevant to the issues involved in this case. And particularly the letter from the Deputy Collector to the Collector is objected to on the further ground because it contains statements which are not only self-serving, but

are inflammatory in nature, which would be very apparent on a reading of them.

There is also attached to the face of the Exhibit an enclosure from the Department of Justice which I presume does not belong on there in any event.

Mr. Landrum: With relation to the Exhibit 33, if the Court please, the testimony of this witness goes to the affidavit of this defendant, Thomas W. Banks. The testimony of this witness is that that is the original signature of Thomas W. Banks. The objection insofar as that affidavit and that portion of the Exhibit is concerned is simply that it is immaterial in that it is in 1937. The Government, therefore, now proposes and will remove from this Exhibit all portions thereof except the affidavit of the defendant, Thomas W. Banks, which this witnss has identified as being signed with the signature of this defendant, Thomas W. Banks. That affidavit, within the body of it, recites and refers to a list which is attached. So we now reoffer this Exhibit, consisting solely of the affidavit of Thomas W. Banks, with the list attached to it.

The Court: Very well. I will examine the Exhibit more carefully and undertake to rule tomorrow morning on it, and these other Exhibits.

Mr. Landrum: In order that the record may be perfectly clear, it is my understanding that this witness has also identified that affidavit as an official Government record. Now, if Your Honor please, if you have any question about the remoteness of it, we would like to be heard on it, because that is the foundation stone for this case.

The Court: There is no objection, then, if this affidavit of this defendant is offered separately?

Mr. Graff: Only as to its relevancy and remoteness, Your Honor.

Mr. Kyle: We will not object to the foundation which has been laid.

Mr. Landrum: That is fine, Your Honor. Let us take it off.

The Court: You may take it off.

Mr. Landrum: Yes, Your Honor.

(The following proceedings were had in open Court:)

The Court: I understand that the affidavit of the defendant is being separated from the balance of Exhibit 33 and is being offered?

Mr. Landrum: Yes, Your Honor.

The Court: And the other portion of the Exhibit is being withdrawn?

Mr. Landrum: Yes, Your Honor, and inasmuch as the writing of the Clerk of the Exhibit number is on the other portion of the Exhibit, might we have that number put on that portion of the Exhibit which is now being offered?

The Court: Number 33—

Mr. Landrum: 33, Your Honor.

The Court: 33, yes.

Mr. Graff: No objection, Your Honor.

The Court: That may be done.

(End of Proceedings at the Bench outside the hearing of the jury.)

Q. Now, Mr. McKusick, I ask you from the books and records that were made available to you, were you able to make a determination of this defendant's income for the years 1945, 1946, and 1947?

Mr. Graff: Just a moment. I object to that on the

ground there is not sufficient foundation laid for that question.

The Court: You may answer.

A. I was not.

Q. (By Mr. Lord.) What method did you use, Mr. McKusick, in arriving at your determination of this defendant's income for the years 1945, '46, and '47?

Mr. Graff: Just a moment. I will object to that on the ground that there is not sufficient foundation laid. There has been no basis at all for any showing that this witness made any computation of income, or, if so, from what.

The Court: You may answer the question, if you can.

A. I could answer that question but it would be—I would have to give some background, Your Honor. It was arrived at by sequence of various methods.

Q. (By Mr. Lord.) Will you tell what those methods are, Mr. McKusick?

A. We first tried the direct income method. By that I mean we made comparisons with what was disclosed in our investigation with what was reported on the returns. There were some omissions of taxable items on the returns, but they were unimportant. I next applied the bank deposits, gross bank deposits method, and after some consideration of this method, I discarded it as being inequitable, both to the taxpayer and to the Government. Then I applied what is referred to as the receipts and disbursements method, which is a variation of both. This, too, would have been inequitable, both to the taxpayer and to the Government. So then I made a request of Mr. Weinstock, the taxpayer's auditor, for Mr. Banks' records, and he stated that to his knowledge—

Mr. Graff: Just a moment. We object to having this witness state anything that Mr. Weinstock stated to him on the ground that is hearsay.

The Court: Yes, that would not be competent.

Q. (By Mr. Lord.) Mr. McKusick, had Mr. Banks referred you to Mr. Weinstock to obtain information with respect to his income tax returns?

A. Well, I had no direct contact with Mr. Banks as to his books and records.

Q. My question —

Mr. Lord: Will you read the question, Mr. Reporter?

(The question was read.)

A. No.

Q. (By Mr. Lord.) Mr. McKusick, will you state what method you used in arriving at the figures which you arrived at with reference to this man's income tax returns.

Mr. Graff: Just a moment. The question seems to infer that this witness has arrived at certain figures. Well, we haven't the slightest knowledge or intimation of what those figures might be and I think the question in any event is premature.

The Court: You may answer the question.

A. We applied the net worth method.

Q. (By Mr. Lord.) Now, what was your reason for applying the net worth method in this case?

Mr. Graff: Objected to as incompetent, irrelevant, and immaterial, and calling for a conclusion and not a statement of fact.

The Court: The objection is overruled. You may answer it.

A. Under Section 41 of the Internal Revenue Code, provision is made whereby if the taxpayer's method of reporting his income is inconsistent with his method of bookkeeping, or that no such bookkeeping records were kept, the Commissioner may make correction of that method of reporting income. Now, I was acting under authority con-

ferred on me by the Commissioner in setting up this net worth method.

Q. (By Mr. Lord.) Now, how did you go about setting up—strike that, if you please. I ask you why you decided that you should use the net worth method?

Mr. Graff: That, if Your Honor please, calls for a conclusion, and not a statement of fact, and is objected to for that reason.

The Court: You may answer that question, if you can.

A. Because there were no control records.

Q. (By Mr. Lord.) Mr. McKusick, how did you go about constructing this, the picture of this man's financial activities by the net worth method?

A. I summarized the results of our investigation, classified variously under assets and under liabilities. I subtracted the total of the liabilities from the total of the assets.

Q. Go on.

A. And I did this operation for each year of the period January 1, 1941, through December 31, 1947. My comparison—I compared the net worth at the end of the year with the net worth at the beginning of the year and from that, or to that difference I added living expenses and made other adjustments, which would arrive at what the taxpayer should have reported in income in that year.

Mr. Lord: If the Court please, I have called this witness for the specific purpose of laying a foundation for the use of the net worth system in this case in arriving at the income which the Government has charged here. I should like the Court's permission to withdraw the witness at this time and turn him over for further examination with permission to later present further evidence by and through this witness.

The Court: Do I understand that you surrender this witness at this time for cross-examination?

Mr. Lord: Yes, Your Honor.

The Court: Very well.

Mr. Landrum: But with the understanding, if the Court please, that he may be recalled, as I understand —

The Court: And testify further on direct.

Mr. Landrum: Yes, Your Honor.

The Court: As to the net worth method.

M.r Landrum: Yes, Your Honor.

The Court: Well, —

Mr. Graff: I would prefer, of course, Your Honor, to have them finish with this witness and then turn him over to us. It would appear to be much more orderly than the method suggested.

The Court: Well, it would seem to me so, but if that can't be done at this time, you may call another witness.

Mr. Landrum: If Your Honor please, Counsel has been objecting all the time to the fact that we have not laid a foundation. Now, we have laid the foundation. We have put this witness on to lay the foundation for the testimony with relation to the net worth method and we have surrendered him for the purpose of cross-examination insofar as we have gone. However, it will be necessary to bring him back to proceed with further testimony. We put him on here just to show we have a right to proceed under the net worth method. That is all we have done so far.

Mr. Graff: Well, I do not agree with the statement of Counsel and I suggest, Your Honor, that they complete with this witness before they turn him over for cross-examination.

Mr. Landrum: That is impossible.

Mr. Graff: Well, then I suggest that they proceed with their direct examination of this witness.

The Court: That may be done. This witness may be excused for the time being. Call your next witness.

JOSEPH A. O'GORDON called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination.

I am 65 years of age and live at St. Louis Park, Minnesota. My occupation is that of a lawyer. In 1950, I represented Thomas W. Banks as lawyer and attorney. I communicated with special agent George McKusick with reference to the tax returns of Thomas W. Banks.

Do you recall a meeting in the office of Mr. Stone, the head of the Special Agents in St. Paul in the summer of 1950?

A. I think that was in the fall of 1950.

Q. Would it be in about August?

A. I cannot recall the month.

Q. Could you tell us what was the purpose of that visit?

A. Well, that depends upon who you mean. From my point of view or theirs?

Mr. Graff: Well, just a moment. May I ask this witness a few questions, Your Honor, for the purpose of making an objection?

The Court: Yes. Pertaining to foundation.

Q. (By Mr. Graff.) Mr. O'Gordon, did I understand you to say you are a lawyer?

A. Yes, sir.

Q. And did you during 1950 represent Mr. Banks in connection with certain of his matters?

A. Yes, sir.

Q. And did you represent him in connection with some of his tax matters?

A. Yes, sir.

Q. Now, was the meeting which you had in the, late in the year of 1950 in connection with the tax matters of Thomas Banks?

A. They were.

Q. And did you represent him at that particular meeting as an attorney for Tom Banks?

A. Yes, sir.

Mr. Graff: At this time, if the Court please, we will object to any testimony by this witness on the ground that any information that he obtained in connection with the tax matters of Tom Banks were acquired as an attorney and, therefore, would be privileged, and the client and the taxpayer has not given any consent to permit his lawyer to speak in violation of that privilege.

Mr. Landrum: If Your Honor please, might I suggest that a discussion of this matter, I feel in fairness to all, should take place outside of the hearing of the jury. There certainly is another side to it, Your Honor, and it is going to take, I feel, just a little while to acquaint Your Honor with the true situation; and I feel it should be not in the presence of the jury because I don't want to prejudice anyone by anything we say.

The Court: When I adjourn Court I am willing to hear Counsel for the respective parties in regard to the matter you have mentioned.

Mr. Lord: Mr. Joe O'Gordon.

Mr. Graff: May we approach the Bench a moment, Your Honor?

The Court: You may come forward.

(The following proceedings were had at the Bench, outside the hearing of the jury:)

Mr. Graff: At the close of the session last evening, or shortly before the close, the Court indicated what its views would be with respect to the competency of the testimony of Joseph A. O'Gordon. Because of the importance of the point, I might say that a careful reading of the Himmelfarb case cited by counsel for the Government indicates that that case is not necessarily authority for the proposition here contended as that concerned the competency of the testimony of an accountant. We would like, in view of the Court's indication yesterday, to have a general objection to any and all testimony of this witness on the ground that his testimony is incompetent because it is privileged. Rather than make that objection to each and every question, I wonder if we could have that general objection running to all of his testimony?

The Court: That may be understood.

Mr. Graff: Thank you, Your Honor.

The Court: It might be well to present an objection to questions of a serious nature so that the Court might sustain the objection. That is the problem.

Mr. Graff: I did not want to be in the position, Your Honor, of objecting to every question when the Court had indicated its ruling.

The Court: You want to avoid that and that is very proper.

Mr. Hoffmann: Perhaps then to expedite examination and to preserve the objection that Mr. Graff has to any particular question, could we then — as indicated by Your Honor, that might well be the basis of a then special objection — merely say "Objection" for the purpose of having the Court rule on that particular question without repeating the grounds.

Mr. Lord: That would be more desirable from the Government's point of view, Your Honor.

The Court: Very well.

(Thereupon the following proceedings were had in open court:)

Mr. Lord: For the purpose of the record, Your Honor, in order to expedite the proceeding, I would withdraw the question which I have heretofore asked Mr. O'Gordon and start over again with his testimony.

JOSEPH A. O'GORDON called as a witness on behalf of the United States, further testified as follows:

Direct Examination

In the Fall of 1950 I had occasion to go to the office of Arthur Stone, head of the special agents of the Bureau of Internal Revenue. While there together with Mr. Stone, Mr. Meshbesher, Agent McKusick and Agent Thomas, we discussed the income tax liability of Thomas W. Banks.

Q. Did you then request that those officers furnish you with a list of questions and that you would then submit the questions to Mr. Banks and return his answers:

A. I answer the question, yes, but it did not originate with me.

Mr. Landrum: The answer is yes?

The Witness: Yes, it was discussed, yes.

Q. (By Mr. Lord.) And did you agree to take these questions to Mr. Banks and return with the answers?

A. I do not recall ever — I do not remember suggesting that I would take them to Mr. Banks but I did agree that we would accept the questions and try to answer them, for the purpose of settling a civil tax —.

Q. (By Mr. Lord.) I am going to ask you for a yes or no answer.

A. Yes.

Mr. Lord: And, if the Court please, may I have permission to cross-examine this witness?

The Court: I think there is no occasion for that at the present time. Just proceed with the examination.

Q. (By Mr. Lord.) Now, Mr. O'Gordon, was such a list of questions submitted to you?

A. Yes, sir.

Mr. Graff: May the answer go out just for the purpose of making an objection, Your Honor. There is another point that has arisen. It appears from the questions which have been asked that another lawyer was present at this conference, Mr. Meshbesher. Now, we are going to make the further objection to this line of testimony because of the privilege that would exist between the taxpayer, Mr. Banks, and Mr. Meshbesher. May that be added to the other general objection, Your Honor?

The Court: Objection is overruled. You may answer.

I was recently served with a subpoena duces tecum requesting me to bring the original questions which were submitted to me. I did not bring them because I was unable to find them. The questions were given to me about December, 1950.

Exhibit 34 is a power of attorney running from Mr. Banks to me and is dated November 22, 1950. I do not recall who I gave it to but I filed the power of attorney. I presume with Mr. McKusick.

Exhibit 70 consisting of 7 pages is a copy of the list of questions which were submitted to me.

Mr. Lord: Government's Exhibit 70 is offered in evidence, Your Honor.

Mr. Graff: With respect to Government's Exhibit 34, Your Honor, it is objected to on the ground that it will not tend to prove or disprove any of the issues in this case. It has no probative value as an exhibit. That it is a power of attorney running from the taxpayer to Mr. O'Gordon, there

is no question about. We do not see how it tends to prove or disprove any issues involved in this case and it is objected to for that reason.

The Court: I would like to see it.

(Exhibit handed to the Court.)

The Court: Exhibit 34 is received.

Exhibit 70 also contains answer to the questions. Government's Exhibit 71 consisting of two sheets is the list of answers that I submitted to Mr. McKusick. Exhibit 71 contains the same answers that are on Exhibit 70. Exhibits 70 and 71 are offered in evidence.

Mr. Graff: Exhibit 71 is objected to for three reasons. The general reason, or rather the general objection which has heretofore been given to the Court; the second objection is that these answers, according to this witness' testimony, were submitted as part of a proposed civil settlement. For that reason we feel that they are inadmisible in this proceeding. And, thirdly, with respect to Exhibit 71, we feel that the writing in the upper righthand corner of Exhibit 71 is hearsay and not properly a part of that exhibit.

With respect to Exhibit 70, we make the same general objection which has already been made, and the further objection that the answers were submitted to the questions as part of a proposed settlement in a civil case. It is objected to for that reason.

The Court: The exhibits are received.

Cross-Examination.

At the conference in Mr. Stone's office had the latter part of 1950, in addition to Mr. Meshbesher and myself, Mr. Peter Masica may have been there together with Mr. McKusick and Mr. Walter Thomas.

Q. What was the purpose of the conference held in Mr. Stone's office at that time?

A. It was my understandng that that conference was arranged for the purpose of discussing a civil settlement of a civil liability if any existed for this taxpayer.

Q. And were these questions submitted and were the answers submitted pursuant to the understanding that they were to facilitate a civil settlement, if any tax liability existed?

A. Yes, sir.

Q. Did you have that in mind when you submitted the answers reflected by Government's Exhibit 71 to Mr. McKusick?

A. Yes, sir.

Mr. Landrum: The government offers in evidence the following exhibits:

Exhibit 37—Sheriff's Certificate, Frances Jedlika to Thomas W. Banks and wife.

Exhibit 38—Quit Claim Deed from Gordon Pribble to Thomas W. Banks and wife.

Exhibit 39—Warranty Deed from Gustaf Schlenker, et al, to Rita Banks and husband.

Exhibit 40—Warranty Deed from Walter R. Hanson and wife to Thomas W. Banks and wife.

Exhibit 41—Quit Claim Deed from Sarah D. Heard and husband, to Rita L. Banks and Thomas W. Banks.

Exhibit 42—Warranty Deed from Helen M. Richardson to Thomas W. Banks and wife.

Exhibit 43—Warranty Deed from Mary Pearson to Thomas W. Banks and wife.

Exhibit 44—Warranty Deed from William Hosli and wife, to Thomas W. Banks and wife.

Exhibit 45—Warranty Deed from John L. Lewis and wife, to Thomas W. Banks and wife.

Exhibit 46—Warranty Deed from Charles L. Horn to Thomas W. Banks.

Exhibit 47—Deed from the Commercial Investment Company, et al, to Thomas W. Banks and wife.

Exhibit 48—Mortgage from Charles L. Horn to Anne A. Greer.

Exhibit 49—Satisfaction of a Mortgage from the First National Bank of Minneapolis to Charles L. Horn.

Exhibit 50—Assignment of a Mortgage from Stanley M. Lyman to Stanley Mitchell Lyman, Jr., et al.

Exhibit 51—Mortgage from Commercial Investment Company to Stanley M. Lyman.

Exhibit 52—Satisfaction of a Mortgage from Alice L. Harrison, et al, to Commercial Investment Company.

Exhibit 53—Warranty Deed from Hazel Aarhus to Rita Banks.

Exhibit 54—Warranty Deed from Rita Banks and husband to Minnie M. Donahue.

Exhibit 55—Warranty Deed from Will M. Koon to Rita Banks.

Exhibit 56—Warranty Deed from Rita L. Banks and husband to Edmund P. Murphy and Mary Ramona Murphy, husband and wife, as joint tenants.

Exhibit 57—Probate Deed from Dorothy E. Carlson, as Administratrix of the Estate of Jessie McRae Zahn, to Rita L. Banks.

Exhibit 58—Quit Claim Deed from the Village of St. Louis Park to Rita L. Banks.

Exhibit 59—Assignment of a Mortgage from Midland National Bank and Trust Company of Minneapolis, as Trustee to Investors Syndicate Title and Guaranty Company.

Exhibit 60—Assignment of a Mortgage from Investors Syndicate Title and Guaranty Company to Hazel Aarhus, et al.

Exhibit 61—Deed, Crow Wing County, Minnesota.

Exhibit 62—State Assignment Certificate, Crow Wing County, Minnesota.

Exhibit 63—State Assignment Certificate, Crow Wing County, Minnesota.

Exhibit 64—State Assignment Certificate, Crow Wing County, Minnesota.

Exhibit 65—State Assignment Certificate, Crow Wing County, Minnesota.

Exhibit 66—Notice of Lis Pendens, Crow Wing County, Minnesota.

Exhibit 67—Judgment entitled Rita Banks, Plaintiff, versus Allured Bayard Netteleton, et al, Crow Wing County, Minnesota.

Proceedings had May 20, 1952 Exhibits 37 to 67, inclusive, have been offered in evidence. Is there any objection, counsel?

Mr. Graff: Yes, Your Honor. With respect to Exhibits 37 to 67, in compliance with the Court's request, I examined them between the close of the session and the opening of the session today. Insofar as the foundation is concerned, all the exhibits appear to be certified copies of certain documents in County Courthouses. There is no objection insofar as the foundation is concerned. However, the objection runs to the immateriality and the irrelevancy of each and every exhibit, and each and every exhibit from 37 to 67 is objected to on that basis.

The Court: As I remember, the documents are deeds or evidence to title of the property to defendant in this case.

Mr. Graff: Evidence in most part of deeds, Your Honor. In some cases satisfaction of mortgages, some cases Sheriff's deeds, things of that kind, notice of lis pendens, things that would normally be filed in a Register of Deeds Office.

The Court: Well, the exhibits are received.

That is, Exhibits 37 to 67, inclusive, Mr. Reporter.

You may proceed.

WILLIAM A. RIEK called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at 5016 Upton Avenue South, Minneapolis, Minnesota and I am 43 years of age. I am an auditor for the Marquette National Bank of Minneapolis and I was subpoenaed to bring certain records to Court. Exhibit 72 consists of original ledger sheets for a checking account in the name of Thomas W. Banks for the period May 23, 1941 to April 26, 1948. Exhibit 72 is offered in evidence.

Cross-Examination as to Exhibit 72

The third sheet of Exhibit 72 includes entries into the year 1951. There is no objection to Exhibit 72 as to any entries subsequent to the year 1947. (Exhibit 72, as marked, is received in evidence.)

Direct Examination Continued

Exhibit 73 is a bank money order drawn on the Marquette National Bank in the amount of $5,400.00 payable to the Walter Lemon Insurance Agency. (Exhibit 73 is received in evidence.)

Exhibit 74 is a bank money order No. 5594 on the Marquette National Bank in the amount of $11,750.00 payable to

the Title Insurance Company as escrow agents and the remitter is Rita L. Banks. Exhibit 75 is a ledger card of the bank covering a loan made to Thomas W. Banks. Exhibit 76 is a record of a collateral deposit to support a loan made at the Marquette National Bank by Thomas W. Banks and the amount of the loan is $2,500.00 and bears the date of May 23, 1941.

(Exhibits 74, 75 and 76 are received in evidence with the right to strike later in the trial.)

No Cross-Examination.

HAROLD H. BANKS called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at Lexington, Nebraska and I am 54 years of age and a brother to the defendant in this action. On or about January 31, 1934 I loaned Thomas W. Banks $2,000.00 which was repaid on or about August 2, 1944 and this loan was outstanding during all the intervening period.

MRS. CARRIE E. ANDERSON called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I am Vice-President of the Grand Marais State Bank, Grand Marais, Minnesota. I am 65 years old and live at Grand Marais, Minnesota. Exhibit 77 is the individual or joint and several savings account of Thomas W. Banks and Rita Banks in the Grand Marais State Bank. Exhibit 78 is a savings ledger of our bank covering the account of Thomas W. Banks and Rita Banks, 3817 Drew Avenue South, Minneapolis, Minnesota. The account started on August 31, 1943 and there still is a balance. The last date

shown on Government's Exhibit 78 is May 21, 1952. (Exhibits 77 and 78 are offered and received in evidence.)

WALTER HALVORSON called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

(Exhibit 79, a duly certified copy of a mortgage from Walter Halvorson to Thomas W. Banks, is offered in evidence and is received in evidence.)

Direct Examination

I live at Grand Marais, Minnesota and I am 48 years of age and am employed by the Cook County Highway Department. I know Thomas W. Banks and I have known him since about 1935. In September, 1943, I borrowed $1,400.00 from Mr. Banks which I paid back at the rate of $25.00 per month except for a period of time when my wife and I were both in the hospital. I completed the payments in 1949. The records of the Grand Marais State Bank reflect the times and the amounts of repayment by me.

Cross-Examination

I made the payments to Mr. Henry Eliason, an attorney in Grand Marais and he desposited them in the bank. I have known Tom Banks since 1935 and he did not charge me any interest on this loan. He sent the money to Mr. Eliason and Mr. Eliason gave it to me.

ALBIN L. LINDMAN called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I am 52 years of age and live at Anoka, Minnesota, and am cashier of the First National Bank at Anoka, Minnesota. Exhibit 80 consisting of nine sheets is from the Commercial Deposit Ledger of the bank for Thomas W. and Rita Banks,

3817 Drew Avenue South, Minneapolis, Minnesota. Exhibit 80 contains the deposits and withdrawals from that account for the period May 15, 1942 through April 20, 1948. Exhibit 81 is a liability ledger of our bank and shows loans made by the bank to Rita Banks and Thomas Banks. The first loan was made on May 15, 1942 and the final repayment was made on November 10, 1943. (Exhibit 80 is received in evidence.)

J. WIMER HAMILTON called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at 4615 Zenith Avenue South, Minneapolis. I am 44 years of age and I am an accountant with Jamieson Company. Their business is that of stock brokers located in Minneapolis. Exhibit 82 is a check drawn by Jamieson and Company payable to the order of Rita L. Banks in the amount of $24,887.00. (Exhibit 82 is offered in evidence.)

Exhibits 83, 84, 85, 86 and 87 are ledger sheets of Jamieson and Company reflecting the accounts of in some instances Mrs. Rita L. Banks and in some instances Thomas W. Banks, and in some instances Thomas W. Banks and Mrs. Rita Banks. These records show the acquisition of certain stock in Merchants Distillery in 1946 in the name of Rita Banks, care of Simon Meshbesher, 1234 First National Soo Line Building. (Exhibits 83, 84, 85, 86 and 87 are offered in evidence.)

(The following proceedings were had at the Bench, outside the hearing of the jury:)

Mr. Hoffmann: Your Honor, as Mr. Landrum, I believe has pointed out this morning, there may be many exhibits offered by the Government during the course of the trial that bear upon years prior to 1945 and subsequent to 1947. It is the contention of the defense that all of such exhibits

are immaterial and any testimony bearing upon those years would be irrelevant and immaterial and not within the triable issues of this case. Some of the exhibits that I now have in my hand I believe pre-date that year and some ante-date that year, 1947. It is our thought that if the Court permitted, the record could note a continuing objection on behalf of the defendant to any such exhibits pre-dating January 1, 1945, and subsequent to December 31, 1947, without our having to take them individually during the course of the trial and repeating them into the record. I am sure it would expedite the entire matter.

The Court: Your objection may stand as to all matters mentioned in this objection or statement made to the Court.

Mr. Hoffman: Then, Your Honor, when the individual exhibit is offered or testimony—

The Court: When the individual exhibit is offered, I will undertake to familiarize myself with it as well as possible. If I think it has some materiality and competency in the case, it will be received. Otherwise it will not be received.

(Exhibits 82 to 87 inclusive are received in evidence.)

Cross-Examination

Any information concerning Exhibits 83 to 87 inclusive is based upon observation of the exhibits rather than upon contact personally with the transactions reflected thereon. Exhibit 83 demonstrates deposit with our firm of 360 shares of Merchants Distillery stock and the sale of such stock in two blocks, 100 and 260 resulting in a credit. The credit of $10,600.62 shown on Exhibit 87 represents a deposit into the account of such amount, but whether the deposit was made in the form of cash or in the form of check cannot be ascertained from this exhibit. Exhibit 84 shows the receipt on October 21, 1946 of Northwest Airline rights in the amount of 750 shares and a deposit by the customer of $6,938.00 for which the customer received 375 shares of stock. Exhibit

86 has as its first entry, December 31, 1947 and shows that the company received from the customer 1,125 shares of Northwest Airlines, Inc. stock. The last entry on Exhibit 85 is dated January 29, 1948, and shows that our company delivered shares of stock to the customer and that closes out the account as far as Exhibit 85 is concerned.

SIMON MESHBESHER called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I am 56 years of age. I live at 4900 Queen Avenue South, Minneapolis, Minnesota and my occupation is that of a lawyer. My office is located at 1234 First National Soo Line Building. During 1943 I organized a corporation known as the B & S Corporation, and the business address of that corporation was 1234 First National Soo Line Building. I was served with a subpoena duces tecum to produce certain documents and books of the B & S Corporation but I have not brought with me such books and records as they have not been in my possession for a long time. I turned them back to thestockholders and officers some time ago. Harry Shepherd, Thomas Banks and Thomas Ewing are officers of the company. I saw Harry Shepherd about a month ago but I do not know where he is now. I saw Thomas Ewing four to six weeks ago but I do not know where he is now. I do not have in my possession any of the books and records of the B & S Corporation.

CARROLL ANDERSON called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at 4216 Webster Avenue, St. Louis Park, Minnesota and I am 41 years of age. I am an auditor of the First Na-

tional Bank of Minneapolis. Exhibit 88 is the checking account ledger of Rita Banks, 3817 Drew Avenue South, Minneapolis, Minnesota. The first entry is December 29, 1936. There is a running balance as of the end of every transaction in that ledger. The last entry on the last page is June 17, 1948. Exhibit 89 is a ledger card in the name of Mrs. Thomas W. Banks used in the savings department of our bank for savings deposits. The first entry on Exhibit 89 is October 18, 1928 and the last entry is August 1, 1945.

(The following proceedings were had at the Bench, outside the hearing of the jury:)

Mr. Lord: If the Court please, for the record, with reference to Government's Exhibit marked for identification as 89, and Government's Exhibit 90, marked for identification, we propose to bring out by the testimony of this witness that the small balances in these accounts in the amount of $1.03 and $4.85 approximately, remain in the name of Thomas—remained in the name of Reta Banks, and Mrs. Thomas W. Banks, through the period under investigation. However, we, in order to introduce the bank records of this asset, it is necessary to introduce records showing deposits way back as far as 1928 in the instance of Government's Exhibit 90 and 1928 with reference to Government's Exhibit 89. Now, if it would be agreeable with the Court and with counsel, we would have the witness testify as to this continuing obligation, which would preclude the possibility of any prejudice by introducing the prior figures.

The Court: Have you laid foundation for those exhibits?

Mr. Lord: Yes, Your Honor. We have.

The Court: Well, then you can offer them in evidence and announce that you are not interested in entries made prior to a certain date, that they are being offered for the entries made during the date in which you are interested, and you can inquire of this witness if these records show certain

things and let him examine them and he may testify as to the amount on deposit at the beginning of the time and what became of the money and how much there was at the end of the time. There may not be any objection to that. If there is, we will have to rule when the time comes.

Mr. Lord: Thank you, Your Honor.

Mr. Hoffmann: As long as we are up here, may I have these just a moment? I think we will save time. There is objection on the part of the defendant to Government's Exhibits 89 and 90 on all of the grounds heretofore stated, and continuing as a general objection, and upon the particular ground as to these two proposed exhibits that these are accounts of Reta Banks and their materiality and relevancy is not established. But as I understand it, the Court gives us the permission to move that they be stricken from the record if they are not later connected up.

The Court: That may be done. You may proceed.

(Thereupon the following proceedings were had in open court:)

Mr. Lord: Your Honor, at this time the Government offers in evidence Government's Exhibit 89. However, we offer it only insofar as the period of the deposits in this account running from December 31, 1936 through December 31, 1947.

The Court: There is no objection except as has been stated to the Court?

Mr. Hoffmann: That is true, Your Honor.

(Exhibits 89 and 90 are received in evidence.)

The last entry on Exhibit 89 is August 1, 1945, in the amount of three cents. The next preceding entry in time and in amount was on August 7, 1944 in the amount of $1.00. The amount of $6.09 is still owing to Mrs. Banks by the bank

BLEED THROUGH

as of December 31, 1947. Exhibit 91 is a check dated May 8, 1946 of the First National Bank payable to Rita L. Banks in the amount of $10,600.62 endorsed by Rita L. Banks Exhibit 92 is a cashier's check of the First National Bank dated May 8, 1946 payable to the order of Mrs. Rita L. Banks in the sum of $2,994.38. Exhibit 92 is endorsed Mrs. Rita Banks and E. A. Jeffords. Exhibit 93 is a cashier's check drawn on the First National Bank dated April 5, 1946 payable to the order of Thomas W. Banks in the sum of $11,034.50. Exhibit 94 is a form used by the bank bearing date May 8, 1946 and the name Mrs. Rita L. Banks, not bearing a date at the usual place and is a form used by the bank for the recording of bonds being redeemed at the bank. There is no way in which I can determine the date of Government's Exhibit 95.

Cross-Examination

Exhibit 88 is objected to subject to all of the objections noted in the record and the further objection in particular because of it being an account in the name of Rita Banks. Exhibit 88, is received by the Court. (There is no objection to Exhibit 92 and Exhibit 92 is received by the Court.)

The proceedings representing the redemption of the bonds as evidenced by Government's Exhibit 94 were submitted to the person entitled to such proceedings by cashier's check. There would be supporting entries in the books of the bank covering the issuance of the check itself. I did not look for any such entries. What has been said with respect to Exhibit 94 prevails with respect to Exhibit 95. (Exhibits 94 and 95 are received in evidence.)

Exhibits 91 and 93, being two cashier's checks, representing the transmittal of the proceeds to the customer of the redemption of the bonds represented by Government's Exhibits 94 and 95. (Exhibits 91 and 93 are received in evidence.)

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Mr. Lord: We offer in evidence:

Exhibit 96—Certified photostatic copy of bond record dated May 16, 1952.

Exhibit 97—Certified photostatic copies of redeemed bonds bearing date of March 16, 1952.

Exhibit 98—Photostatic copies of bonds bearing date May 5, 1952.

(Exhibits 96, 97 and 98 are received in evidence subject to a motion to strike.)

STANLEY M. LYMAN called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I am 59 years of age and live at Wayzata, Minnesota. I am engaged in the real estate business at 642 McKnight Building. Exhibit 99 is a mortgage record card which I keep in my office to record mortgages, dates of payments, etc. Exhibit 99 pertains to the so-called Oneida Building in Minneapolis. (Exhibit 99 is received in evidence.)

Cross-Examination

Exhibit 99 shows the original entry and shows the payments as they are made monthly. The last transaction is November 6, 1947 and it shows that it was paid in full on November 7, 1947. It shows that a mortgage was made on June 5, 1942 in the amount of $7,500.00 and the payment and satisfaction of it are demonstrated by the three cards representing Exhibit 99.

STANLEY J. TOMAN called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination.

I am 57 years of age and live at 9600 Normandale, Minne-

apolis, Minnesota. I am assistant secretary of the McKnight Company, and building manager of the McKnight Building. Exhit 100 is the cash receipt and check register of the S. T. Mcknight Company. Exhibit 100 demonstrates the cash received from various sources. (Exhibit 100 is offered in evidence.)

Mr. Lord: The offer in evidence of Government's Exhibit 100 is made only insofar as it reflects an entry in these books on a page which is not numbered but which entry bears the date May 14, 1946, and is entry number — it is on the page beginning May 14, correction, and it bears the date May 27th and the name Harry Clark, and with the figures and notations thereafter set out.

(Exhibit handed to Mr. Hoffmann.)

Mr. Hoffmann: Perhaps if I might so suggest to not burden the Clerk and the record, if counsel for the Government would state what they want from this book, we might agree that the book so shows and this big book need not be received.

Mr. Lord: It is our request that the book be offered in evidence insofar as this page is concerned.

The Court: Well, offer it in evidence if you want it in evidence.

Mr. Lord: I have offered it in evidence.

The Court: Has it been offered?

Mr. Lord: Yes, Your Honor.

The Court: Any objection?

Mr. Hoffmann: Well, we have no way of knowing, Your Honor, from the entry in this book, which is a book of someone else, how this matter under the name of another individual pertains to this case or to this defendant. Its materiality certainly is not demonstrated fo rthe purpose of our

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passing upon the admissibility in the way of any objection or admission. We have no way of knowing what this refers to.

The Court: You may proceed to ask this witness about these entries that you want in evidence in this case.

Mr. Lord: Yes, Your Honor. If the Court please, I believe there are already exhibits in evidenc which will give materiality to this particular entry.

The Court: If you want the entres in that book in evidence, find out what they are.

Q. (By Mr. Lord.) I ask you, Mr. Toman, what is reflected by the entry as to the name of Harry Clark, bearing the date May 27, 1946?

A. The amount shown after H. Harvey Clark, — there are two amounts, $4,000.00 and $1,000.00.

Q. And what do they reflect?

A. The $4,000.00 is indicated as currency.

Q. And the $1,000.00?

A. The $1,000.00 as a check.

Q. And do you have any other entries after that name?

A. We have the entries showing "Contract for sale of real estate."

Q. And what is after that?

A. The sum of $5,000.00, representing earnest money payment.

Q. Do you have another entry in this book reflecting payment from Mr. Clark:

A. We do.

Q. And is that on the following page, bearing the date of June, 1946, and the 13th day thereof?

A. That is right, sir.

Q. And what is that entry?

A. It shows cash, $3,000.00, a Marquette National Bank check of the Sons of Norway to H. Harvey Clark and Thomas W. Banks, one for $11,500.00, the other for $22,500.00.

Q. What is the entry on the extreme right of that line?

A. It shows a credit to real estate number 51, known as 224 South Tenth Street.

Q. In what amount?

A. In the sum of $37,000.00.

Mr. Lord: Your Honor, at this time, I offer in evidence those pages of Government's Exhibit 100, which have been quoted from by the witness. If the Court please, I will request that the Clerk mark those pages as 100-A and 100-B.

The Court: I did not get the purpose of that $37,000.00 entry.

The Witness: Final payment of that transaction — final payment for the real estate.

The Court: Final payment for the real estate?

The Witness: That is right.

The Court: That was involved in the transaction ?

The Witness: That is right, sir.

The Court: Very well.

Exhibit 102 is an earnest money contract running from T. S. McKnight Company to H. Harvey Clark and that refers to the real estate mentioned in Government's Exhibit 100.

(Exhibit 102 is offered in evidence.)

Exhibit 101 is a journal of the S. T. McKnight Company for the period April, 1946 to December, 1947. Page No. 50 is marked Government's Exhibit 101-A which contains several journal entries. The top entry on Exhibit 101-A transfers some real estate into contract for sale of real estate as of May 27, 1946, real estate property numbered 51 covering property at 224 South Tenth Street. Forty-two Thousand Dollars represents the consideration in the earnest money

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contract for sale. The next entry is depreciation which covers the period from the date the McKnight Company acquired the property to the date of sale. The next entry is the loss on the sale of real estate which is $8,667.20. The next entry is a credit to real estate in the amount of $55,000.00 and that describes the real estate at 224 South Tenth Street and the purchaser of the property is H. Harvey Clark. None of the other entries on that page have reference to this property.

(Exhibits numbered 100, 100-A, 100-B, 101 and 102 are received in evidence.)

Cross-Examination

Some of the figures which have been read from Exhibit 100-A have no reference to the sale of this property except for the purposes at the McKnight Company. The McKnight Company had a cost of $55,000.00 for the building and the entries that were made for depreciation cost were made for capital gain or capital loss purposes. The sole consideration for the purchase of the building is represented by the earnest money contract for the sale of real estate which is marked Exhibit 102 betwen H. Harvey Clark and the McKnight Company which contract is dated April 10, 1946 and also for $42,000.00. Exhibits 101-A and 100-B show the receipt by the McKnight Company of $42,000.00. On May 27th the total purchase price paid by H. Harvey Clark for this property was $42,000.00. The reference to the $55,000.00 was for the McKnight Company's own tax purposes.

ANNE B. FREDLUND called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I am 43 years of age and live at 4300 Aldrich Avenue South, Minneapolis. I am a bookkeeper for the Ring Construction Company located at 721 Metropolitan Building,

Minneapolis. I have worked there since February 18th of this year.

Exhibit 103 is a ledger card under the name of Thomas Banks. Exhibit 103 is an accounts receivable sheet of our company under the name of Thomos Banks. Exhibit 104 is an account in our records in the name of Thomas Banks, 3817 Drew Avenue South.

(Exhibits 103 and 104 are offered and received in evidence.)

The entry on Exhibit 103 as of December 31, 1947 was a year end entry bringing forward a credit balance on Thomas Banks' residence account of $2,000.00. Mr. Banks had forwarded a check to the Ring Construction Company on account of work, labor and material that we were performing at his residence at 3817 Drew Avenue South. On Exhibit 104 on page 20 a charge was made to Thomas Banks' residence for labor and material in the amount of $5,247.77. I cannot tell from looking at these exhibits how much was charged against Mr. Banks for work done up to and including December 31, 1947. On a small project of this type, the billing is made at the date of completion.

Cross-Examination

My testimony with respect to Exhibit 103 is based on the regular procedure at the Ring Construction Company of bringing forward balances. Exhibit 103 simply shows that on November 19, 1947 a deposit of $2,000.00 was credited to the account of Thomas Banks' residence at 3817 Drew Avenue South. Exhibit 103 was closed out on December 31, 1947 and the credit remaining in the account of $2,000.00 was posted on Exhibit 104 as a credit under date of February 20, 1948 and the account was carried on from there. The account reflected by Exhibit 104 was closed out on December 15, 1948. Nothing on the exhibit demonstrates when the work was completed.

ERNEST G. HAGBERG called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I am 62 years of age and live at 3715 Pleasant Avenue, Minneapolis. I am the collection manager for the Department of Rural Credits, State of Minnesota. Exhibit 105 is a mortgage given to the State of Minnesota, Department of Rural Credit on July 17, 1924, by Erick Pearson and Mary Pearson, his wife covering the Southwest Quarter of the Southeast Quarter and the Southeast Quarter of the Southwest Quarter, in Government lots numbered Two and Three of Section Eleven, Township One Hundred Twenty North, Range Twenty-two West, Hennepin County. On the second full page of Exhibit 105 an item reads "This Agreement to Assume Mortgage was signed by Thomas W. Banks and Rita L. Banks, husband and wife, as joint tenants and not as tenants in common, on September 20, 1939." Exhibit 106 is our permaent ledger card records of all payments made on the mortgage. (Exhibits 105 and 106 are offered in evidence and are received.)

Exhibit 107 is a statement prepared at the time that the assumption agreement or the mortgage is assumed by Mr. Banks. The first figure on the top thereof is the amount that was shown on our ledger card as the amount still owing on the mortgage at the time that the mortgage was assumed by Mr. Banks and his wife which amount is $4,704.45. Exhibit 107 more clearly reflects the balances due and the payments thereon than Government's Exhibit 106.

(Exhibit 107 is offered and received in evidence.)

Cross-Examination

Exhibit 107 was mailed out on September 18, 1950. The loan in this matter was paid in full on July 24, 1944, and the release of the mortgage and other papers were mailed to Thomas W. Banks on August 3, 1944.

FREDERICK J. WICKERS called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I am 47 years of age and live at 2483 North Snelling, Saint Paul, Minnesota. I am the President of the Power Brake and Equipment Company. Exhibit 108 is a check drawn on the Power Brake and Equipment Company payable to the order of F. J. Wickers in the amount of $1,250.00 and bearing date of August 21, 1947. I signed the check and I also endorsed it. It also bears the endorsement of Rita Banks. Exhibit 109 is a check drawn by the Power Brake and Equipment Company on September 26, 1947 to the order of F. J. Wickers in the sum of $1,362.50. I have signed the check and also have endorsed it and it also bears the endorsement of Rita Banks. The amount of Exhibits 108 and 109 represent the repayment of a loan received from Rita Banks.

(Exhibits 108 and 109 are offered and received in evidence.)

The loan from Mrs. Banks represented by this repayment was made in 1946 and the amount of the original loan was $2,500.00 and the checks represent repayment with interest. Exhibit 110 represents corporate records of the Power Brake and Equipment Company and includes the record of stock ownership. Stock Certificate No. 2 in the Power Brake and Equipment Company was issued in the name of T. W. Banks for 37½ shares.

(Exhibit 110 is offered and received in evidence.)

Mr. Weinstock does the accounting for the Power Brake and Equipment Company. Exhibit 111 is the general ledger of the Power Brake and Equipment Company.

(Exhibit 111 is offered and received in evidence.)

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The money I borrowed from Mrs. Banks was a personal loan and I endorsed the checks and turned them over to her in repayment of the loan. I drew the money out of my equity in the Company to repay the loan. The books of the corporation reflect the transaction. Exhibit 112 is a check drawn by the Power Brake and Equipment Company on March 12, 1948, payable to F. J. Wickers in the amount of $4,680.00 which check was signed by me. This check represents repayment of a loan made by me to the Company. I borrowed the money from Mr. Banks to make that loan to the Company. The books of the corporation would reflect the date that the loan was made from me to the corporation. I had the money approximately one year that I borrowed from Tom Banks, the payment of which is represented by Exhibit 112. I borrowed $4,500.00 from Mr. Banks and the $180.00 would represent interest.

(Exhibit 112 is offered and received in evidence.)

Exhibit 112 bears my endorsement and my father's endorsement. My father cashed the check for me at the bank and gave the money to me. I believe I gave the money to Mrs. Banks but it represented a loan from Mr. Banks and the loan was repaid on approximately the date of the check, March 12, 1948.

Proceedings had in the foregoing entitled matter before the Honorable Robert C. Bell on May 22, 1952. Appearances are as has been heretofore noted.

CHRISTIAN J. RATHMANN called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at 1712 Hampshire, St. Paul, Minnesota. I am office manager of the Twin City Milk Producers Association whose address is 2424 Territorial Road. Exhibit No. 113

is a stockholder's record of a contract numbered 4832 for three shares of stock of the Twin City Milk Producers Association. Exhibit 113 shows the date of signing the contract to be February 17, 1942 and the next three entries show the dates that each share of stock was paid in full, namely: February 28, 1942, September 30, 1942 and April 30, 1943. The acquisition value of each share of stock is $55.00 making a total amount of $165.00. (Exhibit 113 is offered and received in evidence.)

Cross Examination

The value of $55.00 per share was actually fixed on August 1, 1936 and has been the same ever since. It is book value and not necessarily market value.

RENE J. DUFOURD called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at 5020 South Second Avenue, Minneapolis, and have lived there 13 years. I am married and I live at this address with my family. I am office manager for the Prudential Insurance Company, Mortgage Loan Department located at 200 LaSalle Building in Minneapolis.

Exhibit 114 is a mortgagors record card for Rita Banks and Thomas W. Banks and Oscar Carlson covering property located at 3952 Beard Avenue South. Exhibit 114 shows the balance on any given date on the mortgage and shows the dates and amounts of payment. (Exhibit 114 is offered and received in evidence.)

Exhibit 115 is drawn from the data in Exhibit 114 and reflects the balances due and owing on that account as shown by our books on December 31, 1941, 1942, 1943 and 1944. (Exhibit 115 offered and received.)

Cross-Examination

The mortgage was paid in full on August 22, 1944. I do not know what interest Oscar Carlson had in the property but an application listed Oscar Carlson as a previous owner.

MORLAN H. BISHOP called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at 4503 Wooddale, Minneapolis, Minnesota, and have lived there five years. I am a securities dealer buying and selling stocks and bonds and my business is located at 1660 Northwestern Bank Building, Minneapolis. Exhibit 116 is a journal dated March, 1945 of my business. (Only that portion of the exhibit which pertains to Mr. Banks is offered in evidence and the exhibit insofar as it relates to transactions with the defendant is received in evidence.)

Exhibit 116 B is a record of purchases made by customers of our business and there is an account in the name of Thomas W. Banks. (Exhibit 117 is offered insofar as it relates to transactions of the defendant, and that portion relating to the transactions of the defendant is received in evidence.)

On exhibit 116 B the figure "400" means 400 shares and the description is Northwest Airlines common stock and "WW" means with warrants. Warrants are the right to purchase additional stock. "32¼" means that the price was $32.25. 400 shares of Northwest Airlines stock at $32.25 per share, makes a total of $12,900.00. To that was added postage and the service charge of 95 cents and a commission of $82.24 making a total of $13,023.19. The amount $13,023.19 is the amount which Mr. Banks paid our company to receive delivery of the shares. There is a second transaction by Thomas W. Banks which consists of 100 shares of Northwest Airlines common stock with warrants at a price

of $32.00 per share, making a total of $3200.00 to which was added postage of 60 cents, a commission of $20.50, making a total of $3,231.10. The date of that transaction was March 22, 1945 and the $3,231.10 represents the final figure which Mr. Banks paid our company in order to acquire this stock. On Exhibit 117 the entry on the third line in the name of Thomas W. Banks represents the purchase on April 9, 1945 of 250 shares of Northwest Airlines stock at $23.00 per share, making a total of $5,750.00 to which was added $15.00 brokerage, making a total of $5,765.00.

J. HOMER THOMPSON called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at 4260 Utica, St. Louis Park and have lived there three years. I am the assistant cashier of the First Hennepin State Bank, Minneapolis, Minnesota. Exhibits 118 through 118 R are collateral records of the bank of loans made on liquor in warehouses to the Casablanca, Incorporated at 408 Hennepin Avenue. We had warehouse receipts on the liquor which amounted to a mortgage and the liquor could not be released until the warehouse receipt was surrendered. Exhibit 118 S is a collateral record of the bank that shows a combination of other collateral records and it reflects the changes as the liquor is drawn out so that it conforms at all times with the amount of liquor left in the warehouse. Exhibit 118 T is the liability record of the bank which shows the loan as well as any reduction or additional loan. Exhibit 118 U and 118 V are continuation sheets of 118 T.

Exhibits 118 A to V represent loans made and secured by warehouse receipts on liquor. The general procedure is for the party who wants to make the loan to submit the list of warehouse receipts and the bank then decides whether

they wish to loan 80% or 75% on the liquor. If the borrower wishes to get any of the liquor for their establishment, they tell the bank what they want and we, in turn, figure the cost of the liquor at the price it was quoted to us and they only have to pay the 80% or 75% whichever the loan was secured by to get the liquor released. At that time we make up warehouse releases and give one to the borrower, mail one to the warehouse and keep one for our records. In this instance Casablanca Cafe had borrowed money on liquor and we took warehouse receipts for liquor held in the name of the Casablanca Cafe. Exhibits 118, 118A through 118 V show the final date on which the transaction was concluded. On the final date it shows that there was some liquor still pledged to the bank. The value of the liquor being $31,088.80 as of February 20, 1947. Exhibit 119 represents two inventories, one from the Colonial Warehouse and one from the Northwest Warehouse. It inventories all the liquor they had in the warehouse on December 29, 1946 in connection with this loan. Exhibit 120 is the liability card kept on a liquor loan to the Shanghai Cafe at 408 Hennepin Avenue from its origination February 20, 1947 until it was closed out September 21, 1948. Exhibit 120 along with Exhibit 125 shows that this loan was made on part of the liquor of the Casablanca Cafe. Exhibit 121 is a collateral record that we keep of the warehouse receipts showing each brand of liquor separately and that shows that we loaned money to the Shanghai Cafe. It shows the withdrawals of liquor per case but it does not show the separate payments. Exhibit 122 is a duplicate of Exhibit 121 with the exception that the price of liquor is figures at the market price.

Exhibit 122 is more of an informative record that we keep for ourselves. Exhibit 123 is a collateral record of liquor kept in the Northwest Warehouse on which loans were made to the Shanghai Cafe. It is a record of the value of the liquor as of the date shown on each line. Exhibit 124 is the same record as Exhibit 123 with the exception that the value of the liquor is given at the invoice price. Exhibit 126 is a

separate collateral record that we keep of the same transactions showing the origination date and the release date of the whole transaction. Exhibit 125 is a comment sheet. (Exhibits 119 through 126 are offered in evidence.)

As of February 20, 1947 there was $31,000.00 loaned by our bank, secured by liquor and the liquor inventory in warehouses to secure this loan was near 20 per cent greater than the $31,000.00. Exhibit 125 states the disposition which was made of the liquor.

Mr. Graff: If the Court please, I have examined Exhibit 125. Exhibit 125 differs from the other exhibits which I have just glanced at. Now, counsel has laid the foundation for these exhibits under the so-called "Federal Shop Book" rule which covers records made in the usual course of business. I would like to direct attention to Exhibit 125, which consists of a self-serving statement and is not a machine or a record that normally would be made, and we object to the introduction of that exhibit into evidence at this time.

The Court: Mr. Thompson, was Exhibit 125 made in connection with this loan?

The Witness: Yes, sir.

The Court: It was customary for your bank to make such records as Exhibit 125?

The Witness: We make a comment such as this on every loan made in the bank with the exception of installment loans.

The Court: It was made about the time of the date of it?

The Witness: Yes, sir.

The Court: The exhibit is received.

(Exhibits 118 to 126 are received in evidence.)

The loan made to the Shanghai Cafe was in the amount of $16,457.96. It was a 90-day loan secured by non-negotia-

ble warehouse receipts on liquor. The loan was made on the basis of 80 per cent of the original invoice cost of the liquor amounting to $21,075.00. It also states that on that same day the liquor was valued at $25,798.00. The loan was made on the portion of the liquor that the Shanghai Cafe kept for themselves upon the purchase of the Casablanca Cafe. Exhibit 118 does not show the exact proportion of the liquor that was transferred to the Shanghai Cafe. Exhibits 118, 118 A through 118 V show the transactions on the business records of our bank concerning the liquor and the payments thereof insofar as the Casablanca Bar and Cafe are concerned. Exhibits 120 through 126 show all the withdrawals and additions down to the final date when the balance was paid off on September 21, 1948.

Exhibit 144 is a comment sheet on liquor on which a loan was made on warehouse receipts and the entries thereon were made by the bank in the regular course of its business and it was the regular course of the business of the bank to make the entries on or about the date they bear. (Exhibit 144 is offered in evidence.)

Exhibit 134 is an inventory on liquor held in the Northwest Warehouse and the owner is shown to be one Harold Asp doing business as Harold's Liquor Store. The second sheet attached to the exhibit is an assignment written on bank stationery, dated February 19, 1947 assigning the liquor to Harold R. Asp, doing business as Harold's Liquor Store signed by William Donnelly by Leonard H. Weinstock, attorney in fact. Exhibit 135 is a liability record of the bank in connection with a loan made to Harold's Liquor Store on February 20, 1947, on warehouse receipts on liquor. Exhibit 136 is a collateral record of the bank in connection with the same loan to Harold's Liquor Store. Exhibits 137 to 143 inclusive are essentially reflections of the same transaction of the loan to Harold Asp, doing business as Harold's Liquor Store. These exhibits originally list the warehouse

receipt number with each brand of liquor and also lists the withdrawals, by brand and by case, as they are made.

Exhibit 145 is a power of attorney running from William Donnelly to Leonard H. Weinstock and is dated February 11, 1947. (Exhibits 127 to 146 are offered in evidence.)

Exhibits 127, 128 and 129 reflect the loan of certain money on liquor stock and the repayment thereon, the loan being made by McCarthy's St. Louis Park Cafe. Exhibit 130 is a bill of sale from the Shanghai Cafe and Paradise Bar to McCarthy's St. Louis Park Cafe being dated September 9, 1948. Exhibit 132 is a bill of sale from Lillian Hollen to McCarthy's St. Louis Park Cafe. Exhibit 131 is the appointment of Archie M. Cary as attorney, by one James W. Toung. The liquor that was in storage was gotten out of storage by paying the bank the amount which we had loaned on the liquor. In the case of the Shanghai Cafe 100 per cent of the invoice price was paid to us to release the liquor but we had loaned only 80 per cent on the liquor. We received a 20 per cent value in addition to the amount of the loan on the liquor. Whenever liquor was released from the warehouse and paid for by the borrower, we kept a record showing the amount of liquor taken out and what it cost. We have a record of what happened to the excess over the actual invoice cost of the liquor.

Exhibits 117, 117 A to 117 Z-1 to 117 Z-34½ and 117 Z-35 to 117 Z-88 except 117 Z-37 represent the over payment over and above the 80 per cent loan out to the Shanghai Cafe at the time that they took the liquor out which is the other 20 per cent and these exhibits represent cashier's checks drawn upon our bank. Exhibit 117 Z-37 is a cashier's check drawn upon our bank dated February 19, 1947 made payable to the order of the Shanghai Cafe and Harold Asp doing business as Harold's Liquor Store in the amount of $4,406.89. I cannot definitely say the purpose for which Exhibit 117 Z-37 was used, but I do know the purpose for which

the other checks in Exhibit 117 were used. (Exhibits 117 through 117 Z-88 are offered in evidence.)

The Casablanca had the original loan with our bank. On or about February 20, 1947 they sold out to the Shanghai Cafe. The Shanghai Cafe intended to stress their food service more than the liquor end of it and they did not want to take over the entire stock of the Casablanca Cafe so they took part of the stock that they wanted and borrowed from us on the 80 per cent of the invoice value. They sold the remaining stock to Harold's Liquor Store and I believe he had the same arrangement, 80 per cent on that part of the liquor that he took from the Shanghai Cafe. The arrangement was made whereby they would pay back 100 per cent to the bank at the time the liquor was released. We would apply 80 per cent on the loan, reducing the amount of our loan in that amount. The other 20 per cent was to go to the former owners of the Casablanca Cafe in the form of cashier's check held in our collection file until they were picked up.

In order to get the liquor released it was necessary to pay us to reduce the amount of the loan with the exception of McCarthy's who did not enter in the same kind of a picture. The extra 20 per cent was paid to William Donnelly.

Exhibit 144 will explain why the checks were made out in the name of William Donnelly. Our bank records showed that William Donnelly was doing business as the Casablanca Cafe. The original liquor stock and the original obligation shown by these exhibits were in the hands of William Donnelly doing business as the Casablanca Cafe and I assume that as distinguished from Casablanca Cafe, Incorporated, meant William Donnelly. When the additional 20 per cent over the value of the liquor and our loan was made, it would be made to William Donnelly by the cashier's checks which have been introduced in evidence.

Mr. Graff: Now, if the Court please, with respect to Exhibits 118 to 118-V, these exhibits are not objected to on the ground of foundation. They are objected to on the ground that they are immaterial to the issues involved in this lawsuit, and if it should be stated that these will be connected up later, I would prefer that counsel make an offer of proof so that we would know what the relevancy of these particular exhibits might be.

The Court: The exhibits have been received, according to my notation.

Mr. Graff: I understood it was subject to my right upon examination to—

The Court: Very well, your objection is overruled.

Mr. Landrum: Are they received now, then, Your Honor?

The Court: They are received. If they have not been received, they are now.

Mr. Graff: Now, if the Court please, with respect to Exhibits 119 to 124, and then Exhibit 126, it appears that all of those exhibits pertain to the Shanghai Cafe and they are objected to on the ground that they are immaterial and irrelevant to the issues involved in this case.

The Court: The objection is overruled.

Mr. Landrum: They are in evidence, then, Your Honor?

The Court: They are in evidence.

Mr. Graff: If the Court please, with respect to the exhibits 134 to and including 143, objection is made, first of all, that the exhibits are incompetent and irrelevant to the issues involved in this action, because this witness has identified them as applying to Harold's Liquor Store, and secondly on the ground that the first transaction reflected in these

exhibits begins on February 20, 1947 and continues until sometime into 1950. Consequently, we do not feel that they are material to the triable issues in this case.

There is no objection, Your Honor, to the foundation for the exhibits.

The Court: Very well, the exhibits are received. Those are Exhibits 134 to 143, inclusive, Mr. Reporter.

Mr. Graff: Objection is made to Exhibits 127 to 132, inclusive, on the ground that they are immaterial to the issues involved in this action, it appearing that they all happened after December 31, 1947, and there has been no showing here that they have or are within the triable issues involved in this case.

The Court: The objection is overruled. The exhibits are received.

Mr. Graff: At this time, if the Court please, objection is made to Exhibits 117 and 117-A to Z, and 117-Z-1 to 34½, and 117-Z-35 to Z-88, on the ground that the checks represented thereby are incompetent and irrelevant to the issues involved in this action.

The Court: The objections are overruled. The exhibits are received.

Mr. Graff: With respect to Exhibit 145, Your Honor, there is no objection.

The Court: Very well. The exhibit is received.

Mr. Graff: With respect to Exhibits 125, 133, and 144, I wish to make this objection. I think I objected to 125 this morning on the ground that that exhibit was not a record which was customarily and ordinarily kept in the bank's business as is contemplated by the Federal Shop Book Rule, and I make the same objection now as to all three of these exhibits, namely, 125, 133, and 145, and would like to direct

the Court's attention to the case of Palmer vs. Hoffman, reported in 318 United States, 109, in which the Federal Shop Book Rule is interpreted by the Court and in connection with the interpretation of that statute, I would like also to direct the Court's attention to the cases of Schmeller vs. The United States, 143 Fed. 2nd, 544, New York Life Insurance Company vs. Taylor, 147 Fed. 2nd, 297. I think these cases, Your Honor, make it abundantly clear that the so-called "Shop Book Rule" was designed solely to facilitate the admission of records which experience had shown to be trustworthy and does not include records such as the recording of statements. I am reasonably sure the Court is familiar with those cases and objection is made to those three exhibits on that ground, and on the ground, of course, that they are hearsay.

The Court: I think on the foundation laid for these exhibits, that the objection should be overruled. It is overruled, and the exhibits are received.

There was an understanding with the Hennepin State Bank that the Shanghai Cafe was to pay 100 per cent of the invoice value of the merchandise and that the bank would apply 80 per cent on the loan and then 20 per cent would be held and later transmitted to Mr. Donnelly. I could not answer you one way or another definitely whether there was a written agreement in the bank. The bank would have to be satisfied that Mr. Donnelly was to receive the equity amounting to 20 per cent, otherwise the bank would not have issued these cashier's check to him.

Re-Direct Examination

I will undertake to bring to court the check register which has been asked about on cross-examination to show who furnished the money or other funds for the checks represented by Exhibit 117.

BEN R. TOENSING was called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at Route 1, Hopkins, Eden Prairie Township with my family. I am 57 years of age and am an attorney admitted to practice law. I have been practicing law since 1922 and I office at 415 Minnesota Federal Building, Minneapolis together with five other lawyers. I was subpoenaed to bring certain books and records to court and I have brought all that I could find. I was appointed Secretary of the Flour City Body Corporation and I have brought with me the records which were supplied to me by the corporation. The president is Mr. A. M. Cary and he has an office in the same suite that I have. Exhibit 146 is a record of the Flour City Body Corporation containing stock certificates and stock stubs. The Flour City Body Corporation is located on 29th and Blaisdell. Exhibit 147 represents the corporate minute book and by-laws and other entries of the Flour City Body Corporation. Exhibits 148 and 149 are also books of the Flour City Body Corporation. I do not know who does the accounting work for the Flour City Body Corporation and I have been the secretary since February 11th. I have brought what I understand is the accounts receivable ledger of the corporation. I will do whatever I can with respect to the other records of the corporation. The business is in liquidation and they are moving and they have to vacate by the end of this month. What can be found will be produced if it is not here.

LAURENCE FRANCIS CONNOLLY called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at Garrison, Minnesota and I am a manager of the Blue Goose Corporation, a resort. I am the vice-president of the corporation. I do not know where the business office of the corporation is but I know that they operate a resort at Garrison, Minnesota. I was served with a subpoena to bring to court certain books and records of the Blue Goose resort. In answer to your question as to whether I brought a check No. 5139 payable to the order of Rita Banks, my answer is that I do not know as I gave the subpoena to the auditor and showed him what I wanted. Whether it is in these envelopes I can not say. By the auditor I mean, Mr. Weinstock. I believe the books are kept in Mr. Weinstock's office but I did not bring them from Mr. Weinstock's office. The books were brought here for me. To the best of my knowledge I have brought all of the books and records of the Blue Goose corporation. Exhibits 150, 151, 152 and 153 are the record books of the Blue Goose corporation. (Exhibits 150, 151, 152 and 153 are offered in evidence.

JEREMIAH J. MURPHY called as a witness on behalf of the United States, being first duly sworn, testified as follows:

Direct Examination

I live at 2724 Quenton Avenue, St. Louis Park with my family. I am the general manager of McCarthy's Cafe located at 5600 Wayzata Boulevard, St. Louis Park. I was recently served with a subpoena requesting me to bring certain books and records of the corporation to court. Exhibits 154, 155, 156, 157, 158, 159 and 160 are records of McCarthy's St. Louis Park Cafe Incorporated. Entries in these books will be made by the bookkeeper or the auditor. The auditor

is Mr. Weinstock. (Exhibits 154 to 160 are offered in evidence.)

CHARLES L. HORN called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

I live at Minneapolis and my occupation is that of a manufacturer. In 1939 I owned a piece of property known as the Southwest one-fourth of the Southwest one-fourth of Section 14, Township 32, Range 24, Anoka County, Minnesota. I received this property in trade from Thomas W. Banks and the property that I traded to him is described as Lots 12 and 13 and the North thirty (30) feet of Lot 14, Block 2, Dorman's First Addition to Minneapolis, which property is commonly known as 4400 East Lake Street, Minneapolis, Minnesota. My auditor keeps books reflecting transactions in which I may have been engaged. I have a regular journal covering transactions in which I engaged, which is in the hands of the accountant who handles my records.

RAY MCKENNAN called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I am 62 years of age and I am a certified public accountant sometimes employed by Charles L. Horn. I keep a record of the various transactions in which Mr. Horn is engaged. I have occasion to make certain entries in journals for Mr. Horn. At the time that I made the journal entries I believe I had documents which substantiate the figures that are shown. I do not remember whether there was a written contract for the transaction representing the exchange of property by Mr. Horn and Mrs. Banks. Exhibit 161 is a transcript of certain entries shown in the books of Charles L. Horn.

Cross-Examination

Exhibit 161 is a transcript of journal entries in some books of original entry kept by Mr. Horn. I do not have the books of original entry with me.

CHARLES L. HORN called as a witness on behalf of the United States, being first duly sworn, further testified as follows:

Direct Examination

Mr. Banks and I did not have any discussion with reference to the value of the property that we traded. I did not arrive at any value as to the property which I obtained in Anoka County. The entire transaction took place through Mr. Brancheau, who is the man selling and trading the property. He and I are the ones that signed the contract for deed and arrived at the values. I do not have a contract showing this transaction but I understand Mr. Brancheau has.

FRANK A. NEUNSINGER called as a witness on behalf of the United States, being first duly sworn, testified as follows:

Direct Examination

I live at 4833 Zenith South, Minneapolis and I am employed as a closer of loans and sales at the First National Bank of Minneapolis. In the course of my business I had occasion to handle a loan involving the property at 4400 East Lake Street, Minneapolis. The First National Bank was appointed as trustee or executor of the estate of Anna A. Greer on February 11, 1946. Included in the assets of the estate was a mortgage of a piece of property located at 4401 East Lake Street known as Lots 12, 13 and 14, Dorman's First Addition to Minneapolis, Hennepin County. Exhibit 162 is the mortgage record card at 4401 East Lake Street. This exhibit shows the original amount, the amount at the time it was introduced as an asset in the estate, in the

amount of $1700.00 with the interest paid to September 1, 1945 and other details in conjunction with the mortgage papers. The original mortgage was made to Charles L. Horn and was assumed by Thomas W. Banks but I do not have the information or the date, but it was prior to the date the estate was admitted to probate. We were appointed executor of Mrs. Greer's estate on February 11, 1946 and the estate was admitted to probate some time prior to that. Exhibit 163 is a receipt of papers delivered to the agent at the time of satisfying the mortgage. (Exhibits 162 and 163 are offered and received in evidence.)

Cross-Examination

The original mortgage was in the sum of $2200.00 and was made by Mr. Horn as borrower, to Anna Greer as lender on March 1, 1929. Anna Greer, the mortgagee, died and we were appointed executor of her estate in February, 1946 and at that time there was a balance of $1700.00 owing on the mortgage which balance was paid in full on April 11, 1946.

ROBERT E. MYERS called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at 2900 West 41st Street, Minneapolis and I work for the Northwestern Federal Savings and Loan Association as secretary. Their place of business is at 823 Marquette Avenue, Minneapolis. Exhibit 165 is a mortgage record card indicating the original amount, the payments made thereon, and the interest charged on a mortgage made by Thomas W. Banks and his wife covering property at 5238 Excelsior Boulevard, St. Louis Park. Exhibit 164 is a record made in conjunction with this loan of the disbursements made thereon in connection with the remodeling and charges in connection with the loan.

(Exhibits 164 and 165 are offered and received in evidence.)

According to Exhibit 165 the first entry is August 31, 1942, when a loan of $6,000.00 was made. Subsequent entries show the amounts and dates of repayment of that loan. Final payment of this loan was made on October 16, 1944. The $6,000.00 is a credit advanced to Mr. Banks and the subsequent entries show the disbursements of those portions of the $6,000.00 which went toward the improvement of the property at 5238 Excelsior Boulevard. On Exhibit 164 it shows a check issued December 5, 1942 to Thomas W. Banks for $1,876.79.

DONALD C. MELBYE called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at 2190 Scheffer, St. Paul, Minnesota, with my family. I work at the Federal Land Bank of St. Paul as an accountant and supervisor of the individual mortgagors' and purchasers' accounts. Exhibit 168 is a record showing a loan on a piece of property described as the West one-half of the Northeast one-fourth, of Section 14, Township 120, North Range 22 West Hennepin County, Minnesota. Exhibit 166 is a transfer of this property subject to the outstanding account with the Federal Land Bank to Thomas W. Banks and Rita L. Banks from Lyle G. Nichols and Lucy F. Nichols. The date this transfer was prepared was October 17, 1946 but that does not necessarily indicate the transfer date. On the third page of Exhibit 167 it shows that the payment of the installment due April 1, 1946 was made by Lucy G. Nichols and subsequent payments were made by Mr. and Mrs. Banks. Exhibit 167 is a record of payments made on account to the National Farm Loan Association office at Buffalo, Minnesota, where these accounts are handled. The payment after the payment of April, 1946,

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was received on November 14, 1946 when we received checks of Rita Banks. The balance due and owing on this account as of December 31, 1946 was $1,072.18. As of December 31, 1947 it was $990.15 (Exhibits 166, 167 and 168 are offered and received in evidence and it is agreed that photostats might be used to replace the original exhibits.)

HAZEL L. AARHUS called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at 2544 Harriet Avenue, Minneapolis, Minnesota, and am engaged in the business of building homes and interior decorating. In February of 1933 I owned the property located at 3817 Drew Avenue South, Minneapolis, Minnesota, and I sold it to Thomas and Rita Banks. Exhibit 169 is the financial statement that I made and in it I recorded the transaction made with reference to the property at 3817 Drew Avenue. The consideration which I received for this property was $11,500.00. $1,500.00 was paid down and there was a mortgage of $5,000.00 which was assumed by Mr. Banks; $4,000.00 on a contract for deed and there was a trade in of a lot for $1,000.00. Payments on the contract for deed were $60.00 per month and the payments were made regularly.

Proceedings had in the foregoing entitled matter before the Honorable Robert C. Bell on May 23, 1952. Appearances are as has been heretofore noted.

J. HOMER THOMPSON called as a witness on behalf of the United States, after being first duly sworn, further testified as follows:

Direct Examination

Exhibit 170 is a record of the cashier's checks purchased showing the payee, the amount, the number of the check and

under the heading "purchased by" it is identified as to what the check was used for and who purchased it. Exhibit 170 relates to the cashier's checks contained in Exhibit 117. The item of $4,406.89 represents a check in connection with the original Casablanca loan which was made on the basis of 80 per cent of the invoice value and there were some off brands of liquor on which the bank did not loan the full 80 per cent. The party who made the loan did not remember definitely but it was a lesser amount than 80 per cent. At the time the Casablanca loan was converted into two loans to the Shanghai Cafe and Harold's Cafe there was that much difference to bring the loan back up to a full 80 per cent. It, therefore, amounted to an increase in the loan and the check was made payable to both the Shanghai Cafe and Harold's Liquor Store. Exhibit 117 Z-27, which is our cashier's check No. 58553, is marked "purchased by Harold's Liquor Store" payable to William Donnelly in the amount of $432.55. That indicates that when there was liquor drawn at that time by Harold's Liquor Store, we applied 80 per cent to the loan and made this check out for the other 20 per cent. The same situation prevailed with relation to all the remainder of the check. That is Exhibit 170 shows on the right hand side who purchased it just as I have explained the previous one. In some instances the name is not indicated but where "L&D" is marked or where "Us" is marked. The cashier's check representing the 20 per cent to be held in our collection file for pick-up. (Exhibit 170 is offered in evidence only insofar as it pertains to the checks we are interested in and is received in evidence.)

CLARK I. HENRIKSON called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at Route 3, Wayzata, Minnesota. I am associated with the Wheel Service Company as president and their office is located at 2375 University Avenue, St. Paul. I have

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been recently subpoenaed to bring certain books and records into court including a stock certificate book. I have not brought such records and I have made a diligent search for such records. The company has been in existence for approximately 25 years, but the existing corporation has been in existence only since 1946. The existing corporation took over certain assets of the prior existing Wheel Service corporation and also took over its physical location, accounts receivable and accounts payable. I do not know what happened to the records of the old corporation with reference to stock ownership and that old corporation was dissolved in 1944. I believe Mr. Wangaard, an attorney of Minneapolis, handled the dissolution of that corporation. I have reason to believe that when we moved our business the old books and record were either destroyed or misplaced.

OWEN V. HARRIS called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live in Robbinsdale, Minnesota and I am employed as an assistant cashier at the University National Bank. Exhibit 171 is a certified check drawn on the University National Bank of Minneapolis. The maker of the check is Levine and Levine, Attorneys at Law. The check is numbered 8185 and there is another document attached to the top of the check which is the general entry copy of the bank which facilitates our charge to the maker's account in certifying the check.

Exhibit 172 is a certified check dated November 1, 1947, numbered 8184 and the duplicate certificate memorandum of the University National Bank bearing a number thereon of 2836.

(Exhibits 171 and 172 are offered and received in evidence without objection.)

Exhibit 171 is a check dated Nov. 1, 1947 made payable to Stanley M. Lyman and bears the endorsement of the Midland National Bank, having been deposited to the account of Stanley M. Lyman and is in the amount of $4,404.40. Exhibit 172 is dated Nov. 1, 1947 and in the amount of $5,595.60 and is payable to Thomas W. Banks and Rita L. Banks. It is endorsed by Thomas W. Banks, Rita L. Banks and Koolaire Incorporated. It was endorsed to the First National Bank of St. Paul and subsequently endorsed by that bank to the University National Bank for clearance.

DAVID A. FREEDLAND called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at 132 Wentworth, West St. Paul, Minnesota. I am office manager of Koolaire Incorporation, which business is located at 310 Cedar Street, St. Paul, Minnesota, and is engaged in the business of air conditioning, refrigeration and small manufacturing. I am also secretary-treasurer of the corporation. Exhibits 173 and 174 are cash books of Koolaire Incorporated.

Page 238 of Exhibit 173 shows a transaction wherein Thomas Banks acquired certain stock. Page 250 of Exhibit 174 contains some entries with reference to the acquisition of stock by Thomas W. Banks. Exhibit 175 is sheet No. 82 of the general journal and has to do with the acquisition by Thomas Banks of certain shares of stock in your company. (Exhibits 173, 174 and 175 are offered in evidence.)

(Cross-Examination as to Foundation for Exhibits.)

The name of Thomas Banks does not appear on page 238 which is Exhibit 173.

(Direct Examination Continues)

There is an account number that would associate this entry with the other entry in our books and that is account No. 72 which is the sale of stock in account 100 to notes payable. That account number appears on Exhibit 175 of page 82. Exhibit 182 is the stock certificate book of common stock of Koolaire Incorporation. Exhibits 176 through 181 are from the general ledger of the company. Exhibit 183 is the stock register of Koolaire Incorporated and refers to the preferred stock. The other exhibits, consisting of journal sheets and journal ledger sheets refer to stock certificates issued to Mr. Banks in Exhibit 182 or 183. Exhibit 184 is a set of duplicate deposit slips in the First National Bank of St. Paul for Koolaire Incorporated, the first entry being October 31, 1947 and the last entry being December 24, 1947. Exhibit 184 A is a page from Exhibit 184 and represents a deposit in the First National Bank on November 6, 1947. Exhibit 184 B is a deposit slip by Koolaire in the First National Bank on December 6, 1947. Exhibit 176 is a general ledger of the company and this seems true as to each of the Exhibits 176 through 181. The page number of the general ledger is in the right hand corner of these exhibits.

In Exhibit 177 the ledger account number is 152. In Exhibit 178 the general ledger account number is 907. In Exhibit 179 the general ledger account number is 102. In Exhibit 180 the general ledger account number is 1. In Exhibit 181 the general ledger account number is 72. (Exhibits 173 through 184 B are offered and received in evidence.)

The first entry in a chain of events which ultimately resulted in the issuance of stock to Thomas W. Banks is the entry on November 6, 1947 on Exhibit 173. Page 238 of Exhibit 173 shows cash received in the amount of $28,400.60 and credited to capital stock subscription $23,400.60, account

No. 72 and a credit to notes payable account number 102 in the amount of $5,000.00.

Exhibit 179 represents a credit of $5,000.00 from Exhibit 173. The entry shows a reference to the cash book, page 238 and that shows a $5,000.00 credit to cash in account No. 102 contained in Exhibit 179. The name of the person who owns the $5,000.00 credit is not shown on Exhibit 179. Later on stock was issued for the notes payable. Exhibit 185 is a record of journal entries of December, 1949. With reference to the $5,000.00 on account No. 102, there was stock issued from the common stock register book in December, 1949. Account No. 102 is the place where the $5,000.00 was credited as a receivable. (Exhibit 185 is offered and received in evidence.)

Stock was issued the date that the $28,400.00 was deposited with your company and it was issued to Thomas Banks and Harry Clark. 100 shares were issued to Thomas Banks and 100 shares to Harry Clark and the date of the issuance was November 6, 1947. That stock was still outstanding as of the end of 1947. The credit of $5,000.00 was still on our books at the end of 1947 and ran to the credit of the person who deposited the $28,000.00. Later on shares of stock were issued for the $5,000.00 and 25 shares were issued to Banks and 25 shares to Harry Clark. I then charged off the notes receivable in the amount of $5,000.00 in payment of those shares.

Q. Did Mr. Clark subsequently make an additional deposit to pay for the stock that was issued him?

A. Yes.

Mr. Hoffmann: If the Court please, may the answer be stricken?

The Court: It may be stricken for an objection.

Mr. Hoffmann: If the Court please, objection is made to the line of inquiry now pursued by the district attorney

for the reason and on the ground that there is no materiality established and particularly its materiality is objected to on the basis of our standing objection that the transaction now proposed to be inquired into in the light of the witness' testimony, I would assume was subsequent to December 31, 1947.

The Court: Can you connect this with the material parts of the case?

Mr. Lord: Your Honor, I propose to do it to clarify this transaction wherein Mr. Clark and Mr. Banks both deposited money, it was comingled and certain shares were issued, and it is my purpose in making this inquiry to show what Mr. Banks' investment was in the shares that were issued to him, and in order to do that I propose to show what Mr. Clark paid for his shares.

The Court: You may proceed. The question may be answered. The objection is overruled.

Mr. Lord: Would you read the question, Mr. Reporter?

(The question and answer were read.)

Mr. Hoffmann: If the Court please, the answer demonstrates the fallacy of the District Attorney's premise.

The Court: Well, we will have the facts and see what the situation was, if this witness can give the facts.

Q. (By Mr. Lord.) Mr. Freedland, when the stock was issued on the date of deposit of $28,400.00, what amount of that money went to pay for the 100 shares of stock issued to Mr. Thomas W. Banks?

A. $15,700.00.

Q. Take the $28,400.00 and subtract from it the $5,000.00 which you put in,—was it notes receivable?

A. Notes payable.

Q. Notes payable, which I believe leaves the sum of $23,400.00, does it not?

A. That is right.

Q. If you take away from that sum of $23,400.00 the amount which you say Mr. Banks paid for his shares, which was what amount again?

A. $15,700.00.

Mr. Hoffmann: May I, for the purpose of an objection, Your Honor, inquire as to whether the District Attorney is now asking these questions based upon the witness' recollection or upon some record? If the latter be the fact, we ask that the best evidence be produced.

The Court: Have you got it in the record?

Mr. Lord: It is in the record, Your Honor, but for the purpose of clarification, I believe that it is almost impossible to understand these records for this Court and jury without this man's explanation.

The Court: This witness may explain the records,—call attention to the entries and what they were made for.

Q. (By Mr. Lord.) Mr. Freedland, is it or is it not so that when Mr. Banks was issued his stock and $5,000.00 was credited in another account and Mr. Clark was issued an amount of stock equal to the amount issued to Mr. Banks, that there was still due and owing on the stock issued to Mr. Clark an amount equal to approximately $8,000.00?

A. That is right.

Q. When was that $8,000.00 paid by Mr. Clark?

A. About a month later,—I believe it was December 8th.

Q. Mr. Freedland, directing your attention to that $5,000.-00 credit, you stated, did you not, that subsequently some stock was issued?

A. That is right.

Q. Was part of that stock issued in the name of Harry Clark?

A. 25 shares.

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Q. How many shares were issued in the name of Mr. Banks?

A. 25.

Q. What, then, would you say was the value of each of those shares of stock?

Mr. Hoffmann: That is objected to as calling for an opinion, a conclusion, and not the best evidence.

The Court: That is true, and without foundation. If this witness can qualify to testify as to value, he may do so.

Q. (By Mr. Lord.) What did Mr. Banks pay for that 25 shares of stock?

A. $2500.00.

ARTHUR W. FLANNAGAN called as a witness on behalf of the United States, after being first duly sworn, tsetified as follows:

Direct Examination

I live at 316 Meander Road, Minneapolis. I am manager of the Mortgage Accounting section of the Investors Syndicate. Exhibit 186 is an itemized statement of the Mortgage Loan Department of Investors Diversified Services, Incorporated, bearing date of May 19, 1951, and contains the name Hazel Aarhus and Thomas W. Banks, 3817 Drew Avenue South, loan No. 11-20236. Exhibit 187 is a mortgage ledger of Investor's Syndicate No. 11-20236 and which refers to the mortgage at 3817 Drew Avenue South. (Exhibits 186 and 187 are offered and received in evidence.)

Exhibit 186 shows the payment on the mortgages and the balances resulting after such payment. Exhibit 187 shows the payments on that mortgage and the balances owing as of each date when a payment is made. As of December 31, 1936 the balance owing was $3,925.79 and the mortgage was

finally satisfied and paid off on November 1, 1944. As of December 31, 1942, the balance was $2,066.73. As of December 31, 1943 the balance would be $1,187.87, but there may be a variance of $2.00 or $3.00 because of the accrual of interest.

ROBERT SCHUETTLER called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at 1408 West 28th Street, Minneapolis and I am 33 years of age. I am employed as a salesman in the jewelry business. In November, 1944, I borrowed $10,000.00 in cash from Thomas Banks. I used the money to buy the Marquette Bar from Stelle O'Neil. The loan was made at about the time I purchased the bar. I sold the bar in approximately February of 1945 at which time I paid back the $10,000.00 to Mr. Banks.

TIMOTHY E. BUCKLEY called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at 666 East Montana Avenue, St. Paul, Minnesota, and I work for the Commercial Investment Company. Our business is the buying, selling, loaning and managing of real estate. Exhibit 189 is an earnest money contract for the sale of the O'Neida Building in Minneapolis. Exhibit 188 is a bill of sale dated November 4, 1944. There is no signature on Exhibit 188. My recollection is of having executed an instrument similar to that and delivered to Mr. E. W. S. Yeates, a realtor in Minneapolis. Exhibit 190 is an escrow agreement having to do with the sale of the

O'Neida Building bearing date of October 26, 1944. Exhibit 191 is a journal entry having to do with the sale of this property. Exhibit 192 is a ledger card from our bookkeeping system representing the income from the sale of the O'Neida Building property. (Exhibits 188 to 192 are offered and received in evidence.)

CLARENCE J. MCCONVILLE called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at 8555 Portland, Minneapolis, Minnesota. I am a lawyer employed by the Title Insurance Company of Minnesota. Exhibit 193 is an escrow card showing the transaction of our title No. 121866. This exhibit is a record of the escrow agent referred to in the escrow agreement and has reference to the property known as the O'Neida Building. (Exhibit 193 is offered and received in evidence.)

FREELAND W. HARLOW called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at 6019 Minnetonka Boulevard, St. Louis Park, Minnesota. I am the general agent for the Penn Mutual Life Insurance Company, in Minneapolis and in the northern part of the State and our address in Minneapolis is at 1111 Nicollet Avenue. Exhibit 194 is a policy record card which is kept on every policy owner that the company has. It has to do with a policy of life insurance issued by our company on the life of Thomas W. Banks and was issued in 1925 and is still in effect. The reverse side of Exhibit 194 shows

that there was a loan made on the policy on December 27, 1932 in the amount of $1,500.00. As of December 31, 1936 the balance owing on the loan was $1,500.00 and the loan was paid in full on May 28, 1941. (Exhibit 194 is offered and received in evidence.)

Mr. Lord: If the Court please, the Government and Mr. Banks, through his counsel, and the Government through its counsel, have agreed upon a stipulation in this matter, which I should like at this time to read into the record.

"IT IS HEREBY STIPULATED AND AGREED in the above-entitled matter as follows:

"I

"That Internal Revenue Agents had books and records of Pearson News Service available to them at one time, and since said books and records are not now available, transcript thereof may be admitted as best evidence and the defendant waives any objection under the best evidence rule or for lack of foundation.

"II

"That books and records of Pearson News Service, turned over to the Government by Pearson News Service for years 1946 and 1947, may be admitted in evidence without objection as to foundation.

"III

"That photostatic copy of Pearson News Service check No. 1619 dated June 29, 1943, in the sum of Five Thousand Dollars ($5,000.00), is a true copy of an original check, no

longer available, and may be admitted in evidence and without objection on the ground it is not the best evidence.

Dated, May 23, 1952.

/s/ PHILIP NEVILLE
United States Attorney for the District of Minnesota

/s/ C. U. LANDRUM
Special Assistant United States Attorney

/s/ MILES W. LORD
Assistant United States Attorney
Attorneys for Plaintiff

HOFFMANN, DONAHUE, GRAFF & MEIER
By /s/ JOHN W. GRAFF
/s/ A. JEROME HOFFMANN
/s/ RICHARD KYLE
Attorneys for Defendant."

(Exhibits 195, 196, 197, 197A, 198, 198A, 199 and 200 being books and records of Pearson's News Service and particular pages thereof are offered in evidence. These exhibits are objected to as to such parts that do not pertain to 1945, 1946 and 1947 on the ground that they are immaterial and irrelevant to the triable issues in this case. The exhibits are received in evidence.)

BEN R. TOENSING called as a witness on behalf of the United States, after being first duly sworn, further testified as follows:

Direct Examination

I have produced in court further books and records of the Flour City Body Corporation. By stipulation between counsel they are agreed to be the books of said company.

ELMER P. HANSON called as a witness on behalf of the United States, after being first duly sworn, further testified as follows:

Direct Examination

Exhibit 201 consisting of 28 parts consists of forms 899. Form 899 is a certificate of assessments and payments. It shows the names of the taxpayer, the taxable period, the year, the account number, the amount assessed, date of payment, amounts of payments and credits and constitutes official records of the Bureau of Internal Revenue.

Exhibit 201 shows the income tax paid by Thomas W. Banks from the year 1937 to 1947. Exhibit 201 also reflects the payments made by Rita Banks for the same period. (Exhibit 201 is offered in evidence.)

Cross-Examination

Exhibit 201 covers years other than 1937 to 1947 and it covers items other than the tax. (Ruling on admission into evidence on Exhibit 201 deferred.)

PHILIP BRANCHEAU called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at the Sheridan Hotel, Minneapolis, and I am a realtor. I am engaged in the listing, selling and appraising of practically all types of real estate. I was served with a subpoena to bring certain documents here and I have brought what I was able to find. Exhibit 202 is an earnest money contract dated August 26, 1946, covering the property described as the Southeast Quarter of Southwest Quarter of Lots 4 and 5, in Section 10, Township 120, lying north and east of the so-called Dayton or West River Road, as now laid out, in the County of Hennepin and State of Minnesota.

Exhibit 203 is a quit claim deed dated April 1, 1946, from Lavina Hall as grantor to Gustaf Schlenger, as grantee. (Exhibits 202 and 203 are offered in evidence and are objected to on the ground of immateriality and irrelevancy and are received in evidence.)

I have handled a transaction concerning the property located at 5538 Excelsior Boulevard, Minneapolis, Minnesota, the negotiations of which started in 1940. The property was sold to Mr. and Mrs. Banks. Thereafter the property was improved and made into a duplex residence dwelling. Exhibit 57 covers the property which has been referred to as 5538 Excelsior Boulevard. $21,000.00 was paid for this property. Under my supervision between $9,000.00 and $9,500.00 was spent in improvements on this property from the Fall of 1941 to October, 1942. Exhibit 56 recites a consideration of One Dollar and other good and valuable considerations. The amount paid for this property was $14,800.00. Exhibit 204 is the earnest money contract covering the property just referred to as the easterly five feet of the original description that was in the conveyance by the Zahn estate to Mrs. Rita L. Banks and that is shown on Exhibit 57. (Exhibit 204 is offered in evidence and received.) I had occasion to handle some property owned by William Hesli. Exhibit 205 is a form of earnest money contract dated August 7, 1945, and bears my signature as agent. (Exhibit 205 is offered and received in evidence.)

Exhibit 205 contains 88 acres of farm land located in northwest Hennepin County and the purchase price paid for that property was $5,000.00 under date of August 7, 1945, which was paid at the time of the delivery of the deed. I have had occasion to handle property and a conveyance from Rita Banks to Minnie M. Donahue. Exhibit 206 is an earnest money contract dated September 27, 1944, made out to Mrs. Minnie M. Donahue in the purchase of certain residential property. (Exhibit 206 is offered and received in evidence.)

Exhibit 206 is the earnest money contract pursuant to which the deed in Exhibit 54 was delivered. The $8,500.00 stipulation in the instrument was the full and true consideration for the conveyance. I handled the transaction described in Exhibit 43 which recites a consideration of One Dollar and other valuable consideration subject to an unpaid mortgage. The amount of that mortgage was $4,704.45. This describes the property known as the Pearson farm. The price paid for the property was $8,500.00. I have had something to do with the management of the property known as the 10th Street Realty property. This property is located at the Northwesterly corner of Third Avenue South and Tenth Street in the City of Minneapolis, opposite the Leamington Hotel, kitty-corner from the Curtis Hotel. I have managed the property since the date of purchase by Mr. Clark and Mr. Banks who purchased it from the S. T. McKnight Company in 1946. The building was dismantled in late 1950 and early 1951. I still manage the property.

I managed it on behalf of Mr. Clark and Mr. Banks until it was incorporated under the 10th Street Realty Company which was in late 1946 as I recall. I am the agent for the 10th Street Realty Company and have money in the bank under their name. I am the secretary of the corporation. I am not familiar with Exhibits 22 and 23. The records which I have brought with me represent deposit slips for deposits made with the Marquette National Bank to the account of Philip Brancheau, agent for H. Harvey Clark commencing October 17, 1946 and terminating at the end of 1947. The yellow sheets attached to those exhibits or documents are my stubs removed from the check book of the 10th Street Realty Company showing deposits of rents and checks issued in payment of expenses. I made an annual report each year of this property for income tax purposes and I also have a record of certain advances made by Mr. Clark and Mr. Banks. I have not been able to find any records other than the ones that I have brought to Court.

HOWARD H. GELB called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at 1186 St. Paul Avenue, St. Paul, Minnesota and I am an attorney practicing law in St. Paul. In 1947 I entered into a transaction involving the purchase of the O'Neida Building in Minneapolis and I dealt with Philip Brancheau. Exhibit 207 is a contract for deed between Thomas W. Banks and Rita L. Banks as parties of the first part and Harold Siegel and myself as parties of the second part. (Exhibit 207 is offered and received in evidence.)

Mr. Lord: The Government calls Mr. Harry Clark, Mr. Thomas Ewing and Mr. Harry Shepard. None were present or responded.

Proceedings had in the foregoing entitled matter before the Honorable Robert C. Bell on May 24, 1952. Appearances are as has been heretofore noted.

ERNEST P. LORENZ called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live in Minneapolis, Hennepin County, and I am Clerk of the Probate Court of Hennepin County. We have a probate court file No. 68367, the estate of M. J. O'Connor. In this estate is a record of a proof of claim filed by Thomas W. Banks which is exhibit 208. Exhibit 209 is a release of claims executed by John B. O'Halloran dated January 17, 1951, and filed in the office of the probate court on February 2, 1951 in the estate of M. J. O'Conner. It has reference to the $3,000.00 note and proof of claim mentioned in Exhibit 208. Exhibit 210 is the final account of the administratrix in the estate of M. J. O'Connor and it shows the payment of $2,000.00 of said claim to John B. O'Halloran as assignee of the claim. (Exhibits 208, 209 and 210 are offered and received in evidence.)

I brought with me probate court file No. 44002, being the file for the estate of Jessie McRae Zahn. Exhibit 211 is a report of a sale of real estate dated October 20, 1941 showing the report of the administratrix of the estate of a sale of property to Rita L. Banks in the sum of $2,000.00 and Exhibit 212 is the Court's Order of Confirmation of that sale. The description in Exhibit 57 is the same as in Exhibits 211 and 212. (Exhibits 211 and 212 are offered in evidence and are objected to on the ground of their being immaterial and irrelevant and are received in evidence.)

AL PETERSON called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I am the Chief Deputy Auditor of Hennepin County, Minnesota. Exhibit 213 is a statement of the tax on the Easterly corner of Fourth Street and Marquette Avenue South in Minneapolis, described as Lot 64, Auditor's Subdivision No. 156, taxes paid in full in the amount of $649.95. This tax statement comes from the Treasurer's office and after the first of the year the books are turned over to us. (Exhibit 213 is offered and received in evidence.) The property covered by this exhibit is the property commonly known as the O'Neida Building. The taxes represented by Exhibit 213 are the taxes for the year 1944 which are due and payable in 1945.

HOWARD W. MELBOSTAD called as a witness on behalf of the United States, being first duly sworn, further testified as follows:

Direct Examination

I have testified previously and in the course of my investigation I had occasion to visit the office of Music Installations, Incorporated at 1316 Nicollet Avenue, Minneapolis. It

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was in the Fall of 1946 and I was given certain records of Music Installations. Exhibit 214 is a transcript which I made of the capital stock account of Music Installations, Incorporated taken from the books of that company.

Mr. Graff: May I ask the witness a question or two concerning this exhibit?

The Court: Yes.

Q. (By Mr. Graff.) Mr. Melbostad, did I understand your testimony on direct examination to be that 214 was a transcript made by you of the capital account of Music Installations, Incorporated?

A. Yes.

Q. It contains other things, does it not, Mr. Melbostad?

A. Yes, sir.

Q. Other than the transcript of the capital account?

A. Yes, sir, it does.

Mr. Graff: At this time, if the Court please, we will object to Government's Exhibit 214, it appearing that this is an exhibit copied, or written by this individual from written original books and records, on the ground that it is not the best evidence, and on the further ground that it is hearsay.

The Court: The objection is sustained.

Mr. Landrum: If the Court please, might we be permitted to be heard on that question? I respectfully say to the Court that we feel that it is somewhat important in this action and with the Court's permission, we would like to have an opportunity to present the situation as we view it as a matter of law.

The Court: If you lay the proper foundation, that may change the situation. Now, I have not the least idea of what is on that exhibit. There is data other than the capital account of Music Installations, Incorporated.

Mr. Lord: I proposed—

The Court: (Interposing.) Just a moment. This witness went to the books of some concern and he has had copied or copied himself certain data from certain records. Well, of course, those records would be the best evidence. Anyway, we should know something about what we are receiving in evidence on this exhibit, 214.

Q. (By Mr. Lord.) What other entries did you make on this exhibit?

Mr. Hoffmann: If the Court please, that is objected to as calling for the interpretation of an instrument already excluded by a ruling of the Court, and a circumvention of the Court's ruling.

The Court: I think that is correct.

Mr. Lord: It was not intended as such, Your Honor. I interpreted the ruling to mean that I should further explain the way in which the document was assembled and then lay my foundation for the best evidence.

The Court: Why don't you show when this witness made this examination and what books and records he examined and furnish the foundation for this exhibit? You have not done it.

Mr. Lord: Yes, Your Honor.

Q. (By Mr. Lord.) Mr. Melbostad, when you were at the company, as you mentioned, at their office, did you make any examination of their books and records with reference to the surplus account?

A. Yes, I made a transcription of the surplus account.

Q. (By Mr. Lord.) After having examined the surplus account, what did you do then?

A. I transcribed the surplus account on the same sheet of paper that the capital account was on.

Q. And is that Government's Exhibit 214?

A. Yes.

Q. Mr. Melbostad, do you know where the books and records of Music Installations, Incorporated, are?

A. I do not know where they are now.

Q. Do you know whether or not that company has been dissolved?

A. No, I do not.

LEONARD H. WEINSTOCK called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at 403 Fulton Street, St. Paul, Minnesota, and have lived in St. Paul since 1912. I am 56 years of age and I am engaged in the business of being a public accountant and have been so engaged since 1920. I am not a certified public accountant. I went to work for an accounting firm in 1920 and I was with them until 1921 and I went into practice for myself in 1921. From 1921 up to the present time I have been in the acounting business for myself. My office is located at 506 Plymouth Building, Minneapolis, Minnesota. I have engaged in a general practice and I have also done tax work during those years in connection with the accounting or separately. I was employed by Music Installations to liquidate the remnants of what was Music Installations. The liquidation of Music Installations, Incorporated was commenced, I think a couple of years ago. I do not know what became of the books of the corporation. I did have them at one time but I turned them back to the company. I believe Mr. Shepard took the books back and the last time I saw the books was about two years ago. I have done some work or my office has done some work for Banks and Shepard, a partnership, within the last two years. I did not have books and records of the partnership in my possession but there were some work papers had in connection with it. I had no relationship to them except in the last two years.

Prior to that any information I received was prepared by other accountants. I had nothing to do with it and I think about a year ago the property was sold and we did some work in connection with that. I do not have any records with me of Banks and Shepard, a partnership. I have turned over some of the records I had to Mr. Graff. It included some of the records pertaining to the Blue Goose and McCarthy's St. Louis Park Cafe. I think my office prepared the corporation tax returns for the Banks and Shepard corporation.

To my best recollection I have not had any books and records of the B and S Corporation in my possession. The books and records of Coin-A-Matic were in my office at one time. They were brought up for the convenvience of the government and left in my office. They were worked on in my office and then returned. This was a couple of years ago and I believe Mr. Melbostad and Mr. McCart originally worked on them and I think later Mr. McKusick worked on them. Mr. McKusick did not make a transcription of any books in my presence. I think Mr. McKusick took the books with him and I do not know where they are now. I know Thomas W. Banks and I have known him since the latter part of 1942. I have met his wife, Rita L. Banks a few times. The first time I met her, I would probably say, was in the latter part of 1942 or 1943.

She has come into my office and signed tax returns. I have, as an accountant, prepared the Federal income tax returns for Thomas and Rita Banks for the years 1942 to 1951. In connection with the preparation of those returns, various people brought the information to me from which I prepared the returns. Mrs. Banks sent me some papers and bills and cancelled checks, etc. I do not recall specifically by whom she sent the information. I think Mr. Banks brought them up at one time. Neither Thomas Banks nor Rita Banks ever furnished me with any personal account books. Thomas

Banks brought to me such income as he had from what was called the "the book" i.e., Pearson News and that information was given to me by Mr. Banks personally. It was usually given to me on an adding machine tape. Mr. Banks told me that the source of the income was wagering. That was what Mr. Banks brought to me to incorporate in his income tax returns insofar as his income from the Pearson News Service was concerned. I could not answer what proportion of his income came from wagering without knowing what else was in the tax returns for those years.

In connection with the returns which I made out and in which I included amounts for wagering, there was no information given to me as for the source of any particular money that was included in the total.

I have heard of Casablanca Incorporated. Some of my employees did some bookkeeping for them and we prepared their tax returns. I held a trusteeship which grew out of or from the Casablanca. I had a power of attorney to act for Mr. Donnelly. Exhibit 35 is a power of attorney to represent Thomas Banks dated April 5, 1951, and it is the power of attorney under which I did represent him. (Exhibit 35 is offered and received in evidence.) (Exhibit 35 was read to the jury by Mr. Landrum.)

I was not a liquidating trustee for a Mr. Donnelly. Mr. Donnelly operated the Casablanca Cafe which was a continuation of the old Casablanca. I do not know from whom Mr. Donnelly purchased the Casablanca Cafe. In connection with my business I carried a trustee account in which all funds that were left with me for any purpose were deposited. It was a general fund under the name of Leonard H. Weinstock, trustee. I was trustee for numerous people and some of the funds of Thomas Banks were deposited in that account as well as some funds of Rita Banks. From that account I paid taxes and transacted other business. The cashier's checks on Hennepin State Bank in Exhibit

117 which were endorsed by me as a trustee were deposited in my trustee account. Not all of the cashier's checks in Exhibit 117 were endorsed by me. The checks in Exhibit 117 which I endorsed were placed in my trustee account which was the same account in which I deposited funds of Mrs. Banks. From that account I made disbursements from time to time.

On October 31, 1947, I drew a check against the trustee account to a man by the name of Len Welsh. Exhibit 215 is my check No. 190 issued on October 31, 1947 to Len Welsh for $5,000.00. The check was endorsed by Mr. Welsh and cleared the bank. This account came out of the Donnelly trust account. That is the one we have been talking about. These checks were Mr. Donnelly's checks turned over to me as trustee and I put them in my own trust account. I was told to turn over the funds of the Donnelly trust account to Mr. Banks. I was to credit the Donnelly trust account to Mr. Banks indirectly. The check which I drew came from funds which I was told to turn over to Mr. Banks. (Exhibit 215 is offered and received in evidence.)

I kept a record of the $5,000.00 check made payable to Len Welsh and it does not show repayment by anyone of the $5,000.00. I do not have the original record, but I have a transcript of it. I had the original in my files but my files have been pulled apart so many times going through them that I am not too sure where it could be. I had original work sheets but I do not have them here. I had records in connection with what is known as the Daily Mail. I do not know whether there were any records specifically pertaining to the $5,000.00 check.

The records of the Daily Mail do not show a repayment of that $5,000.00 by anyone.

Q. (By Mr. Landrum.) Mr. Weinstock, shortly after you received this power of attorney, which is in evidence in this case, from Mr. Banks, state whether or not you discussed

with Mr. McKusick or with Mr. Kleven the living expenses of Thomas W. Banks,

A. Yes, sir.

Q. State whether or not you discussed the fact that you had such discussion with Mr. Banks? Mr. Banks knew you were talking about it, did he not?

Mr. Graff: Just a moment. Would you read the question, Mr. Reporter?

(The question was .ead.)

Mr. Graff: I suggest that question is rather compound, Your Honor.

The Court: Yes, it is compound. (To the witness.) You may answer the question, if you can.

A. My discussion of the matter was with Mr. O'Gordon.

Q. (By Mr. Landrum.) Did you not discuss it with Mr. McKusick and Mr. Kleven?

A. That is right.

Q. You did, did you not?

A. Yes.

Q. Thank you sir. At that time state whether or not you reached an agreement with Mr. McKusick and Mr. Kleven with relation to the living expenses of Mr. Banks for certain years?

Mr. Graff: Just a moment. I will object to that on the ground that it asks for a conclusion and does not ask for a statement of fact.

The Court: (To the witness.) You may answer.

A. We did agree on a maximum cost of living in various years.

Mr. Graff: By "we", pardon me, counsel—

Mr. Landrum: I will ask him about that.

Mr. Graff: All right.

Q. (By Mr. Landrum.) You and Mr. Kleven and Mr. McKusick did agree on what you say was a maximum living expense for Mr. Banks for certain years, did you not?

A. Yes, sir.

Q. And state whether or not those years were 1942, 1943, 1944, 1945, 1946, and 1947?

Mr. Graff: Now, just a moment. I am going to object on the further ground that whatever discussion was had was not had in the presence of the taxpayer and hence is not binding upon him, and is therefore hearsay and incompetent as far as the defendant is concerned.

The Court: (To the witness.) You may answer.

Q. (By Mr. Landrum.) That was the years was it not?

A. Those were the years we covered.

Q. And state whether or not the agreement which you reached with these gentlemen, was that for the years 1942, '43, '44, and '45 that expense should be $10,000.00 a year?

Mr. Graff: Just a moment. I will make the same objection to that question that was made to the previous question, Your Honor.

The Court: (To the witness.) You may answer.

A. I don't recal specifically the amounts as they applied to various years. I would have to see something to refresh my memory.

Q. (By Mr. Landrum.) Well, Mr. Weinstock, you recall that the figure of $10,000.00 a year was arrived at, do you not?

Mr. Graff: Just a moment. I will object to this line of questioning, Your Honor, on the ground that it is leading and suggestive.

The Court: Well, that may be leading and suggestive, counsel. I think you could ask the question perhaps in a different form.

The Witness: I don't recall the specific amounts as to specific years.

Mr. Graff: Just a moment, Mr. Weinstock—

The Court: (To the witness.) You may answer.

A. I do not recall specific amounts as to specific years.

Q. (By Mr. Landrum.) But you do know that you did have such an agreement, is that correct?

Mr. Graff: Just a moment. That is objected to as argumentative, leading and suggestive. This is direct examination of this witness.

The Court: (To the witness.) You may answer the question.

Q. (By Mr. Landrum.) You did have an agreement, didn't you?

A. We did reach an agreement on an amount.

Q. Mr. Weinstock, you testified under oath before the Grand Jury in this matter, did you not?

A. Yes, sir. I don't recall of testifying as to this particular thing but I may have.

Q. State whether or not before the Grand Jury, under oath in response to the following questions, you did not make the following answers, Mr. Weinstock—

Mr. Graff: Now, just a moment, Your Honor. Before counsel can be permitted to attempt to impeach this witness or any other witness by reading from something written, it must appear that his testimony here is at variance with that given some other place, and I call the Court's attention to the fact that that foundation has not been laid.

Mr. Landrum: If the Court please, I desire to say to the Court that I am surprised at the evidence given by this witness and I desire to cross-examine him; that I hold in my hand the transcript of other testimony.

Mr. Graff: Well now, if the Court please, there has not been sufficient showing of surprise to warrant the cross-examination of this witness by the questions that have been asked so far.

The Court: Is there anything at variance in the witness' testimony today with that give not any other time?

Mr. Landrum: Yes, sir.

The Court: You have a transcript of it to show that?

Mr. Landrum: Yes, sir.

The Court: You may proceed.

Mr. Graff: If the Court please, may our objection heretofore stated run to the entire line of interrogation?

The Court: That may be understood.

By Mr. Landrum:

Q. Mr. Weinstock, I don't want to confuse you, sir, so I now come to you and I will ask you to state whether or not in response to the following questions propounded to you before the Grand Jury recently you did not make the following answers:—

Mr. Hoffmann: If the Court please, may the time of the alleged basis for the present interrogation be established by the Government and the place?

Mr. Landrum: Yes, sir, — proceedings before the Federal Grand Jury, St. Paul, Minnesota, Friday, May 2, 1952.

Mr. Hoffmann: Now, if the Court please, the record demonstrates that the indictment upon which the defendant is here charged was returned by a Federal Grand Jury January 14, 1952. It is now demonstrated by the District Attorney's statement that the interrogations he proposes to put to the witness on the basis of claimed surprise for the alleged purpose of impeachment were made on May 2, 1952.

The Court: What is the explanation, counsel?

Mr. Landrum: Well, if the Court please, the situation is that this witness was before the Grand Jury on May 2, 1952 and was asked these questions.

The Court: Is that when this testimony was given?

Mr. Landrum: Yes, Your Honor. It doesn't make any difference when he gave it; it is contrary to what he has given now.

Mr. Graff: I submit that counsel is not correct when he states that it doesn't make any difference when the testimony was given. There may be some serious questions that may be raised with respect to the propriety of having this witness before the Grand Jury on May 2, 1952.

The Court: Well, we will not thrash those questions out here at this time.

You may proceed with the examination.

Q. (By Mr. Landrum.) "Question: Subsequent to the date these questions were discussed and the answers returned, to the best of your knowledge did you ever have occasion to discuss with revenue agent Gerald Kleven or special intelligence agent McKusick the living scale of Thomas W. Banks?

"Answer: Well, I went over his schedule that was prepared by Mr. Kleven as to what he considered as living expenses and I told him I didn't care to get into any controversy over living expenses which entailed too many things. I thought it would be much better to settle a definite amount for the various years."

That was your answer?

A. That is right.

Q. "Question: Did you communicate that or express that to Mr. Banks?

"Answer: Yes, I communicated that to Mr. O'Gordon who was representing Mr. Banks at that time and Mr. O'Gordon over the telephone agreed with me, and then when I asked him to put it in writing he refused to do it. I later was back in the case with a power of attorney and that was the first thing I did, was to definitely agree on those points."

That was your answer?

A. That is right.

Q. And that is what I just asked you?

Mr. Graff: Now, if the Court please —

The Court: Just a moment. We will not have any controversy about this. Read the last question, Mr. Reporter.

(The question was read.)

Q. (By Mr. Landrum.) Your answer was "yes," was it not?

A. Yes.

Q. "Question: Mr. Banks knew that you so agreed?

"Answer: He knew that I so agreed."

That is the answer you made, wasn't it?

A. Yes.

Q. "Question: You talked it over with him before you made the agreement?

"Answer: Yes."

That is the answer you made before the Grand Jury, isn't it?

A. Yes, that is right.

Q. "Question: And he agreed on figures which you submitted?

"Answer: Unwillingly, but he did."

That is the answer you made, wasn't it?

A. That is right.

Q. "Question: By unwillingly, you mean that you as his adviser suggested that he agree to those figures?

"Answer: He thought they were too high in the later years and he finally agreed it would be all right."

That is what you said, wasn't it?

A. That is right.

Q. "Question: When he agreed, it was without equivocation?

"Answer: That is right."

That is what you said, wasn't it?

A. I believe so.

Q. Talk out so the jury can hear you.

A. I believe so.

Q. Yes.

Q. "Question: I believe you testified before that the living expenses which you agreed to and which Mr. Banks reluctantly acquiesced to came to $10,000.00 per year during the years '42, '43, '44 and '45?"

Your answer: "That sounds about the amount."

A. That is right.

Q. Yes. "Question: And $12,000.00 a year for '46 and '47?

"Answer: I believe that is right."

A. That is right.

Q. Yes. "Question: Has Mr. Banks ever seen fit to repudiate those figures in your answers?

"Answer: No."

A. That is right.

Q. That is what you said, wasn't it?

A. Yes, sir.

Mr. Graff: Now, if the Court please, I think it has now been demonstrated that the testimony of this witness here has not been at variance with the testimony given by this

witness before the Grand Jury, and I therefore move that there be stricken from this record all the questions and answers which were read by counsel for the plaintiff to this witness purporting to be from a transcript that he held in his hand. I further ask that the jury be instructed to disregard the testimony that they have heard.

The Court: Your request is denied. The record may remain as it is. I think there have been some slight variances. Of course, the jurors are the judges of what the evidence has been. They will rely on their own memory and they will draw their own conclusions from the evidence.

Mr. Landrum: You may cross-examine.

Cross-Examination

By Mr. Graff:

Q. Did I understand you to say, Mr. Weinstock, that you were before the Grand Jury on May 2, 1952?

A. Yes, sir.

Q. When you testified before the Grand Jury with respect to these living expenses, was Mr. McKusick or Mr. Kleven before the Grand Jury at that time?

Mr. Landrum: That is objected to, if the Court please.

The Court: Yes. That objection is sustained.

Q. (By Mr. Graff.) At the time that you testified before the Grand Jury, were any exhibits which had been prepared by Mr. McKusick or Mr. Kleven before the Grand Jury at that time?

Mr. Landrum: That is objected to. That is immaterial. I asked him what his questions and answers were, and that was all, Your Honor.

The Court: I think that is immaterial. I think that it is a matter that we should not go into in the trial of this case. You may ask him anything about what he testified to before the Grand Jury, if you so desire.

Mr. Graff: I did not hear the last part of the Court's —

The Court: You may inquire of this witness what his testimony was. If he desires to make any explanation of his testimony already given, he may do so.

Mr. Graff: Well, I think, Your Honor, I should have a right to show the circumstances under which his testimony was given.

The Court: No, we are not going into the records that were used before the Grand Jury or what other witnesses were present. This is not the place to go into the record of the testimony before the Grand Jury except insofar as this witness' testimony is concerned.

He may make any explanation of his testimony before the Grand Jury that may be desired.

Q. (By Mr. Graff.) Mr. Weinstock, in connection with these living expenses, did you have some conversation with Mr. McKusick?

A. Yes, sir.

Q. Did you have some conversations with Mr. Kleven?

A. Yes, sir.

Q. And were these conversations had prior to the time that there were any figures submitted as probable living expenses? Do you understand my question?

A. I believe they were originally discussed before actual figures were submitted.

Q. You and Mr. McKusick and Mr. Kleven had some preliminary discussions concerning living expenses, is that correct?

A. I think Mr. McKusick and I had some preliminary discussions.

Q. Now, what was the purpose and the reason for arriving at living expenses as explained to you by Mr. McKusick?

A. Well, it was to reach a point of settling the case.

Q. And so is it a true statement that the discussions that you had with Mr. McKusick with respect to the living expenses were for the purpose of arriving at a civil tax liability if there was one?

Mr. Landrum: Just a moment, if the Court please, — I beg your Honor's pardon. Did I get the witness' answer to the question?

The Court: You may read the question and the answer, Mr. Reporter.

The Witness: I did not answer it.

Mr. Landrum: You did not answer it?

The Witness: No, sir.

Mr. Landrum: All right. Then I want you to answer it.

The Witness: Ask me the question again.

The Court: Read the question, Mr. Reporter.

(The question was read.)

A. I never had any definite understanding with Mr. McKusick that it was to be a civil settlement, although all of my work and all of the things I had done in connection with the case was with that thought in mind, that effort.

Q. (By Mr. Graff.) When you had the discussion with Mr. McKusick about the living expenses, what did you and Mr. McKusick hope to accomplish by trying to arrive at some agreement with respect to it?

A. I know what I hoped to accomplish was a civil settlement.

Q. And did Mr. McKusick express himself to the same effect?

A. No, sir.

Q. Did he express himself at all in his discussion with you?

A. As to what type of a settlement?

Q. As to what the purpose of the living expenses were?

A. It was to wind up the case.

Q. And did you submit the figures to Mr. McKusick as part of your understanding that there was to be a civil settlement, if there was any civil tax liability?

A. That was my purpose in submitting them.

Q. And did you so inform Mr. McKusick?

A. No, sir.

Q. Now, Mr. Weinstock, you testified that you had a so-called Trustee account?

A. Yes, sir.

Q. Was this a trust account into which you put other people's moneys which were entrusted to you?

A. Yes, sir.

Q. Was this trust account established for the sole purpose of one individual?

A. No, sir.

The trust account that I had was a place to put other people's moneys which were entrusted to me. The trust account was not established for the sole purpose of one individual. I have had a trust account since 1942 or 1943 and the purpose of my having a trust account was that so funds of other persons would not be commingled. My trust account was not established for the sole purpose of accommodating Mr. Banks. It was for my own convenience in accommodating any and all persons who would give me money which I was to disburse. I had this account in the Lincoln Office of the Northwestern National Bank in Minneapolis. The funds that I received in the Donnelly matter I was directed to turn them over to Mr. Banks but it was not at the direction of Mr. Banks. The funds that I received in the Donnelly matter represented the remaining 20 per cent after 80 per cent went in payment of the loan. The transaction with the bank was a customary transaction. When I received the cashier's checks in Exhibit 117 I deposited them in my trustee account in the Lincoln Office of the Northwestern National

Bank and disbursed them in accordance with the directions that had been given to me.

I prepared the tax returns for Thomas Banks from 1942 to 1951. Exhibits 9, 10 and 11 represent the returns for 1945, 1946 and 1947 bearing my signature on the left hand side indicating that they were prepared by me or under my direction. I have a number of people in my office who work under the general supervision and direction and I had a number of such people working for me during the years 1945, 1946 and 1947.

Q. Now, preparatory to making up the tax returns represented by Government's Exhibits 9, 10, and 11, which have been identified as the '45, '46 and '47 tax returns of Thomas Banks, I will ask you this question: Did Thomas Banks give you information with which to make up the return?

A. He gave me some information.

Q. All right. And you got other information from where?

A. From the other accountants, from sets of books, partnership tax returns, possibly, that were submitted — copies of them.

Q. So that you had the tax returns which had been made where he would receive something and you had that amount to take from the tax returns?

A. That would be right.

Q. Let me ask you this question: At the time you prepared the 1945 tax return for Tom Banks, did he, to the best of your knowledge, withhold any bit of information from you which you might need in making up his 1945 tax return?

A. I never found any —

Mr. Landrum: Just a moment. That is not responsive to the question. I object to the answer and move it be stricken as not responsive.

The Court: Mr. Reporter, you may read the question. (To the witness.) Give close attention, Mr. Weinstock, and undertake to confine your answer to the question.

(The question was read.)

A. No.

Q. (By Mr. Graff.) Did he give to you at the time that he asked you to prepare his 1945 tax return for him all of the information that was necessary for you to make up a true and correct return for him for the year 1945?

Mr. Landrum: That is objected to as calling for a conclusion of the witness.

Mr. Graff: This is cross-examination, Your Honor.

Mr. Landrum: Just a moment, if the Court please.

The Court: Well, it calls for a conclusion.

The best this witness can do would be to give his opinion.

Q. (By Mr. Graff.) Well, what is your opinion, Mr. Weinstock?

Mr. Landrum: I am going to object to that, if the Court please. He is asking this witness to give his opinion with relation to the very fact of what we are trying in this case.

The Court: I intended to say that his witness could give his opinion to the other question. I did not say it would be proper to do so. Is there an objection?

Mr. Landrum: Yes, Your Honor.

The Court: The objection is sustained.

Q. (By Mr. Graff.) You were asked on direct examination whether Tom Banks furnished you any personal account books and your answer to that question on direct examination, according to my notes, was that he did, and let me ask you this question: Did he furnish you with the information necessary for you to make up his tax return?

A. Everything excepting information that I got from the other sources.

Q. Yes. So with the information that you got from other tax returns, from other sources, you were able to make up his tax return?

A. Yes, sir.

Q. Now, I am talking only about the 1945 tax return. Have you had occasion, Mr. Weinstock, since these matters have arisen, to re-examine your office copy of his 1945 tax return?

A. Yes, sir.

Q. Mr. Weinstock, I hand you Government's Exhibit 9, which has been identified as his 1945 tax return, and let me ask you this question: In the light of any and all information which may have come to your attention since the 1945 tax return of Tom Banks has been filed, has there been any information which came to you which would cause you to change in any respect any figure in the 1945 tax return of Tom Banks as prepared by you?

Mr. Landrum: That is objected to, if the Court please, first upon the ground and for the reason it is not proper cross-examination; second, we are concerned with the tax return which was filed for 1945. Any information which he had since then certainly is not material either.

The Court: Now, Mr. Reporter, read that question. It is all right down to a certain point and then I think counsel probably went a little too far. Just read it.

(The question was read as follows: "Question: Mr. Weinstock, I hand you Government's Exhibit 9, which has been identified as his 1945 tax return, and let me ask you this question: In the light of any and all information which may have come to your attention since the 1945 tax return of Tom Banks has been filed, has there been any information which came to you —.")

The Court: "Which came to you —" and there you may stop. The rest of the question is calling for a conclusion and is improper. "Came to you —." Question.

Mr. Graff: I am sorry, I did not understand the ruling of the Court.

The Court: I just eliminated the last several words of the question.

Mr. Graff: I see. Thank you, Your Honor.

The Court: Read it, Mr. Reporter, again, so there will be no question that counsel and the witness will understand just what the Court has done.

(The question was read as follows: "Question: Mr. Weinstock, I hand you Government's Exhibit 9, which has been identified as his 1945 tax return, and let me ask you this question: In the light of any and all information which may have come to your attention since the 1945 tax return of Tom Banks has been filed, has there been any information which came to you —?")

Mr. Landrum: Just a moment, if the Court please. I want to renew that objection. It is not proper cross-examination. It may be possible that counsel might be permitted to ask that question if this man was his own witness, but he is not.

The Court: Well, we will permit an answer. You may answer.

The Witness: I do not know, Your Honor, just what position the question is in now. If I can —

The Court: Well, you have heard it about three times. Read it again, Mr. Reporter.

(The question was read as follows: "Question: Mr. Weinstock, I hand you Government's Exhibit 9, which has been identified as his 1945 tax return, and let me ask you this question: In the light of any and all information which may have come to your attention since the 1945 tax return of Tom Banks has been filed, has there been any information which came to you — ?")

A. I would say there has been no information came to me that would —

Mr. Landrum: Just a moment. He has answered it when he said there has been no information came to him.

The Court: That is correct. You may stop there.

The Witness: All right.

The Court: In other words, you have not obtained any additional information about the tax liability since those returns were made?

The Witness: That is right, sir.

The Court: I think that is a fair question to be asked in this case.

Q. (By Mr. Graff.) Now, you have prepared the tax returns for Tom Banks for the years 1946, 1947, 1948, 1949, 1950, and 1951?

A. Yes, sir.

Mr. Landrum: Just a moment, if the Court please. At this time, if the Court please, the Government respectfully withdraws from the record in this case Government's Exhibits 12, 13, 14, and 15, and asks that they be stricken from the record. If Your Honor please, those are income tax returns for the years subsequent to this indictment, being 1948, 1949, 1950, and 1951. The Government now withdraws those exhibits and asks that they be stricken.

Mr. Graff: If the Court please, I do not know whether this is the proper time for the plaintiff's counsel to now start withdrawing exhibits from evidence, but may I suggest and point out the impropriety of interrogating this witness when these exhibits are in evidence and then when this witness is turned over for cross-examination, to then attempt to withdraw the exhibits so that I may not cross-examine this witness with respect to them?

Mr. Landrum: Well, if Your Honor please, I am going to object to the question then that it is not proper cross-

examination because I did not ask him a single word about those exhibits.

Mr. Graff: I beg to differ with counsel. He asked this witness on direct examination whether he did not prepare the tax returns for Tom Banks for the years 1942 to 1951.

The Court: Well, I think that was the question. You are moving to strike from the record the returns for the years 1948, 1949, 1950 and 1951?

Mr. Landrum: Yes, Your Honor.

The Court: Well, you offered them and they were received. You have a right to make that motion. It is your conclusion now that they are not competent evidence in this case? I will put it this way: That there may be a question as to the competency of that evidence in this case?

Mr. Landrum: I have had them carefully examined and it is my opinion that they are immaterial and that they are not competent evidence in this case.

The Court: Well, they have not been submitted to the jury or read to the jury. The motion is sustained and the exhibits are stricken from the record in this case, and if any knowledge contained in those exhibits has come to the attention of the jury, you may disregard it entirely in this case.

Is there any further examination of this witness?

Mr. Graff: Yes, there is a question pending.

The Court: What is the question, Mr. Reporter?

(The question was read.)

A. The answer is yes.

Mr. Landrum: I move that the answer be stricken in order that I may interpose an objection.

The Court: Well, the answer may be stricken for an objection.

Mr. Landrum: Objected to upon the ground it is not proper cross-examination.

The Court: The answer may remain in the record. It is perhaps immaterial in a measure, but I think harmless. You may proceed.

Mr. Graff: I do not want to labor the point on that last question, Your Honor, but I have a distinct recollection that the same question was asked on direct examination, so I assume that I would have the right to inquire about it on cross-examination.

The Court: Well, I permitted the question and the answer.

Mr. Graff: Yes, Your Honor.

Q. (By Mr. Graff.) Mr. Weinstock, in connection with the preparation of the 1946, 1947, 1948, 1949, 1950, and 1951, tax returns of Tom Banks, has there been any information which has come to you which would cause you to change any of those tax returns in any degree?

Mr. Landrum: That is objected to. We are not concerned with '48, '49, '50 and '51.

The Court: Well, the returns for those years may be eliminated because it has been stricken from the record in this case.

Mr. Graff: May the answer then as to those years be eliminated?

The Witness: As to '46 and '47, no.

Mr. Landrum: All right.

Q. (By Mr. Graff.) Mr. Weinstock, if you had now — in connection with the preparation of tax returns by you for Tom Banks, did he rely upon you to prepare his returns for him —

A. Yes, sir.

Q. Properly?

A. Yes, sir.

Q. And did you in preparing the tax returns for Tom Banks attempt to prepare them properly?

A. Yes, sir.

Q. Did you, to the best of your knowledge and belief, and information, prepare them properly?

A. Yes, sir.

Q. Is it not a fact, Mr. Weinstock, that Mr. Banks entrusted you implicitly in the preparation of his tax returns?

Mr. Landrum: Just a moment. That is objecetd to, if the Court please. It calls for a conclusion of the witness and he certainly does not know what was in Mr. Banks' mind.

The Court: The objection to that question is sustained.

Q. (By Mr. Graff.) Is not it a fact, Mr. Weinstock, that on numerous occasions Mr. Banks would sign the tax returns in blank and request you to complete them for him?

A. Yes, sir — not numerous, — I think a couple of times, a couple years.

Q. He relied on you to make the tax returns and make them true and accurate?

Mr. Landrum: Just a moment, if the Court please. Now, that is objected to upon the ground and for the reason that it is misleading, that it is not proper cross-examination, that it calls for a conclusion of the witness.

The Court: It might, I think, be objectionable, counsel. The question before that, there might have been some question about it, but there was no objection and I permitted the answer.

Q. (By Mr. Graff.) In connection with the preparation of the tax returns for Tom Banks, did he ever withhold any information from you to your knowledge?

A. To my knowledge, no.

Q. Did he ever refuse to furnish you with any and all information that you may have requested from him in connection with the preparation of his tax returns?

A. No, sir, he did not refuse.

Q. After the returns were prepared and signed, did you then cause them to be filed with the Collector's Office?

A. I caused them to be mailed to the Collector's Office.

Q. Yes. Would you mail them to the Collector's Office together with — did you also mail the remittance with them?

A. If there was a remittance required, yes.

Q. In some instances the tax had already been pre-paid?

A. That is right.

Q. So that was not necessary to send a remittance with the return?

A. That is right.

Q. Yes. So if on the basis of the declaration of income the tax had already been paid, then, of course, there would be no remittance accompanying it?

A. That is right.

Q. And if a portion had been previously paid by payments on declaration, then the balance of the tax due would then be transmitted with the tax return that you would mail?

A. That is right.

Q. Mr. Weinstock, did you at the time of making tax returns, make tax returns for a lot of people?

A. A great number of people.

Q. You were not only making tax returns for Tom Banks?

A. Oh, no.

Q. Could you tell us approximately in the course of an average year's business about how many different tax returns you would make for other people?

A. Oh, I would say total tax returns coming out of our office would be between four and five hundred. That, including businesses and individuals and so forth.

Q. And now, Mr. Weinstock, I think you told us originally that you have been in the accounting business, I think, since 1920?

A. 1920 I started.

Q. That would be a period of 32 years?

A. That is right.

Q. During the period of 32 years, I take it, that you have acquired a certain amount of knowledge and skill in matters of accounting and in tax matters?

A. I feel so.

Q. And you maintain an office in Minneapolis in the Plymouth Building, which office you are in charge of?

A. Yes, sir.

Q. In connection with that office you maintain a staff of people who work generally under your supervision and direction?

A. Yes, sir.

Q. In your office as a part of the help that you have working under your supervision and direction, do you have also a certain amount of so-called "GI" training?

A. Yes, sir.

Q. Where people are trained under your direction under the so-called GI Bill?

A. I have trained a number of ex-servicemen.

Q. These are ex-servicemen that are trained by you?

A. Yes, sir.

Q. So that as a result of the training and experience that you have acquired over a period of some 32 years, you have acquired a certain amount of skill and practice in tax and in accounting matters?

A. Yes, sir.

Q. And you hold yourself out as a person who is competent to qualify as a person to assist other persons in making their tax returns and making the tax returns for them?

A. Yes, sir.

Q. And you acted in that capacity for Tom Banks in making his tax returns commencing with the year 1942?

A. Yes, sir.

Q. Mr. Weinstock, coming back to the cashier's checks which came to you from the Hennepin State Bank, and which are identified as the checks starting with Exhibit 117, I asked you whether Tom Banks told you to pay over the proceeds to him and your answer to that question was "No"?

A. Yes, sir.

Q. Who did tell you what to do with the proceeds of those checks?

A. Mr. Mitch, Herman Mitch.

Q. What did he tell you with respect to those checks?

Mr. Landrum: Just a moment, if the Court please. That is objected to. It is not proper cross-examination, no foundation laid, no showing who Herman Mitch is.

The Court: That is not competent, counsel.

Mr. Graff: If the Court please, on direct examination counsel asked him concerning the checks covered by Exhibit 117 and particularly asked him about a check for $5,000.00 payable to Len Welsh. He asked him concerning those funds, whether they came out of the Donnelly fund, so I think the subject matter went into was gone into on direct examination.

The Court: Read the question, Mr. Reporter.

Mr. Graff: According to my notes, this question was asked and this answer was given. "I was told to turn over the proceeds of the Donnelly trust account to Tom Banks."

The Court: Aren't you asking this witness to tell what somebody else told him?

Mr. Landrum: Yes, Your Honor, he is.

The Court: Read the question, Mr. Reporter.

(The question was read.)

Mr. Landrum: Objected to as hearsay and not proper cross-examination.

Mr. Graff: The subject matter was gone into on direct examination, Your Honor, as to what should be done with those particular funds and that is the reason I am following it up.

The Court: You are asking this witness to tell what somebody else told him, which would be purely hearsay.

Mr. Graff: Well, the question was asked him on direct examination what he was supposed to do with those funds.

The Court: Well, he said Herman Mitch told him what to do with the funds.

Mr. Graff: Yes.

The Court: Now, you are asking what Mitch told him. That is hearsay. It is incompetent. I will have to sustain the objection.

Mr. Graff: All right, Your Honor.

Q. (By Mr. Graff.) After I ask this question, Mr. Weinstock, please wait a moment or two in the event there should be an objection. Who was Mr. Mitch?

Mr. Landrum: Just a moment, if the Court please. Now, counsel is going through the back door.

The Court: Well, I will permit an answer to that question. You have told who told you what to do with the money, — it was Herman Mitch?

The Witness: Yes, sir.

The Court: Who was he?

The Witness: Herman Mitch was the previous officer and manager of the Casablanca, Incorporated.

Q. (By Mr. Graff.) Please do not go into any conversation that you may have had with Herman Mitch or anyone

else. Did you, in accordance with the instructions of Mr. Mitch, pay out the money that was in these cashier's checks in the so-called 117 group?

A. Yes, sir.

Q. Now, Mr. Weinstock, I asked you some questions this morning concerning the 1945 tax return of Tom Banks. Now, let me ask you this question with respect to his 1946 tax return, identified as Government's Exhibit 10. At the time that you prepared the 1946 tax return for Tom Banks, did he, to the best of your knowledge, withhold any information from you which you might need in making up his 1946 tax return?

Mr. Landrum: If the Court please, that is objected to. I might say that so far as we are concerned, we are perfectly willing to stipulate that this witness put in everything that Mr. Banks told him.

The Court: Well, I thought the ground had been thoroughly covered.

Mr. Graff: I checked with the reporter, Your Honor, to make sure whether I had asked the question as to only 1945 or also '46 and '47. I find that I had only asked it as to '45. Now, if I may be permitted to ask one general question, I can shorten this a good deal.

The Court: You may proceed.

Q. (By Mr. Graff.) Mr. Weinstock, this morning I asked you certain questions concerning the '45 tax return of Tom Banks. You recall those questions?

A. Yes.

Q. Now, would your answers to those questions be the same if I had asked you concerning 1946 and 1947 tax returns?

A. Yes.

Q. Mr. Weinstock, I hand you Government's Exhibit 9, and direct your attention to the lower part of the exhibit where the date of the return is inserted.

A. The date on which I signed the return?

Q. Well, there is a date between where you signed it and where Tom Banks signed it?

A. Yes, sir.

Q. Yes. And that date was?

A. January 11, 1946.

Q. Is that in your handwriting?

A. Yes, sir.

Q. After you signed the return, Government's Exhibit 9, what did you do with it?

A. Mailed it to the Collector of Internal Revenue.

Q. On what date did you mail it to the Collector of Internal Revenue?

Mr. Landrum: That is objected to, if the Court please, as no foundation laid. How does he know what date he mailed it?

Mr. Graff: Well, let us have him tell us whether he knows or not.

The Court: You may ask him that.

The Witness: I mailed it the day it was signed and dated.

Q. (By Mr. Graff.) So you mailed Government's Exhibit 9 on January 11, 1946?

A. Yes, sir.

Q. Mr. Weinstock, I direct your attention to Government's Exhibit 145. That has previously been identified as a power of attorney, executed by William Donnelly to you. And under that power of attorney, you were given authority, were you not, by William Donnelly to disburse the funds which would come into your possession under the power of attorney from William Donnelly, is that correct?

Mr. Landrum: The exhibit speaks for iself, Your Honor.

A. Yes, sir.

The Court: That is all right.

Q. (By Mr. Graff.) And did you pursuant to the authority in that power of attorney, Government's Exhibit 145, disburse those funds?

A. Yes, sir.

Q. Did you, pursuant to the power of attorney in Exhibit 145, deposit those checks in your trustee account at the Lincoln Branch of the Northwestern State Bank?

A. Yes, sir.

Q. In Government's Exhibits 9, 10, and 11, representing the '45, '46 and '47 tax returns of Thomas Banks, there are certain sheets, typewritten sheets, containing different matters?

A. Yes, sir.

Q. Were those prepared in your office under your direction and supervision?

A. Yes, sir.

Q. Mr. Weinstock, directing your attention to Governments' Exhibit No. 9, and to a typewritten sheet contained therein, under the heading of "Recapitulation," is an item labeled "Miscellaneous income, fees and commissions, $2,000.00." Now, if you will hold that before you, and I direct your attention to a sheet in Government's Exhibit 10, a separate typewritten sheet, also labeled "Miscellaneous income, $2,000.00," and then I direct your attention to Government's Exhibit 11, to a separate typewritten sheet in that tax return entitled, "Miscellaneous Commissions and Fees, $2,000.00."

A. Yes, sir.

Q. Could you please explain to us what those items are to represent, or the purpose of those particular items?

A. The purpose of them was to cover anything that Mr. Banks could not specify as from any particular source, — sort of a "cover-all," should I say, of anything that he might have omitted.

Q. So that it might cover anything that could have been overlooked?

A. That is right.

Mr. Graff: I have no further questions.

Redirect Examination

By Mr. Landrum:

Q. Mr. Weinstock, I believe you told us that you were the trustee in connection with the liquidation of Casablanca, Incorporated, have you not?

A. No, sir, I did not. It might be so construed in an indirect way.

Q. Yes. Well, you did have to do with the liquidation of Casablanca, didn't you?

A. I had to do with the liquidation of merchandise in which the Casablanca still had an equity.

Q. Yes, sir. And, of course, where are the books and records of the Casablanca, Incorporated?

A. I do not know.

Q. Were they destroyed?

A. I do not know.

Q. Did you have them in your possession?

A. At one time, yes, before I moved my office.

Q. What did you do with them?

A. I do not know. I have made a search for them and I could not find them.

Q. You have been asked to produce those books and records, have you not?

A. Yes, sir.

Q. As a matter of fact, was not there something in connection with a fire at the Casablanca?

A. No, there was some—it changed hands two or three times and I do not know whether the books were still in there at the time or whether they were — I moved my office in '46 and I do not know —

Q. It changed hands two or three times and then there was a fire and you do not know where the books went, is that right?

A. I do not recall of there being any fire.

Q. Well, at any event, do you have any records with you here which shows the original capital investment in Casablanca?

A. I have work papers — my work papers.

Q. Yes, and will you tell us what the original Casablanca investment was in '43?

Mr. Graff: Just a moment. I will object to that on the ground that it is improper redirect examination, not covered in either the course of direct or the cross-examination, and on the further ground it is irrelevant and immaterial to the issues, triable issues in this case.

The Court: The objection is overruled.

Q. (By Mr. Landrum.) Will you state the figure, please?

A. The capital stock investment was $15,000.00.

Q. State whether or not it was the same at the time of liquidation?

A. It remained the same.

Q. What was that date?

A. Well, this has never been legally liquidated.

Q. Now, how do you know that you mailed this return on the 11th day of January, 1946?

A. Because I always — the last thing I do is sign them and the envelopes are prepared and ready for mailing when I sign the returns and they are put in the mail immediately.

Q. That has been six or seven years ago, hasn't it?

A. Yes, sir.

Q. Has anyone discussed with you recently the date on which you mailed that return?

A. I believe Mr. Graff asked me —

Q. (Interposing.) Yes. When did he ask you that?

Mr. Graff: Just a moment. I will object to that as being immaterial.

The Court: You may answer.

A. I think about a week ago.

Q. (By Mr. Landrum.) Yes. As a matter of fact, you have discussed this matter with Mr. Graff and the other gentlemen, at least the accountant who sits over there, several times, have you not?

A. No, sir, not several times.

Q. Well, at any event about a week ago Mr. Graff asked you to refresh your recollection with relation to when you mailed that return, didn't he?

Mr. Graff: Just a moment. I will object to that question on the ground it is leading, suggestive, repetitious, —

The Court: Objection is sustained.

Q. (By Mr. Landrum.) Now, where is Herman Mitch?

A. I understand he is dead.

Q. You know he is dead, do you not?

Mr. Graff: Just a moment. I will object to that as being argumentative.

The Court: You may answer that question.

A. I do not know what you mean by "I know." I know his son told me he was dead.

Q. (By Mr. Landrum.) Herman Mitch is dead?

A. I did not attend his funeral. I have never seen anything in the papers excepting the son came to me and told me that he was dead.

Q. Yes. And how long has it been since you have known that Herman Mitch was dead?

Mr. Graff: Just a moment, Your Honor. I will object to it on the ground it is irrelevant and immaterial.

The Court: The objection is sustained.

Q. (By Mr. Landrum.) In any event, I would like to ask you this question: You stated here, did you not, on cross-examination that a man by the name of Herman Mitch had told you to deliver this money to Mr. Banks?

A. Yes, sir.

Q. And according to your information, Herman Mitch is dead?

A. Yes, sir.

Q. And according to your information, how long has he been dead?

A. Since about —

Mr. Graff: (Interposing.) I will object to that on the ground of repetition.

The Court: You may answer; possibly it may have some bearing.

A. About two or three years ago.

Q. (By Mr. Landrum.) About two or three years ago.

Mr. Landrum: That is all.

Mr. Landrum: Now, if the Court please, I am very happy to say to the Court that we have arrived at a stipulation, which I think will relieve us of some time in the introduction of evidence in this case, and with the Court's permission, I desire to read it into the record, and in reading it I desire to say that counsel for the defendant have requested me to say to the Court that they have signed the stipulation, subject only to its relevancy. In other words, they retain the right, if they so desire, to object upon the ground of relevancy.

The Court: Very well.

Mr. Landrum: (Reading.)

"It is hereby stipulated and agreed by and between the parties to this action that during the five-year period beginning January 1, 1937, and ending December 31, 1941, Thomas W. and Reta L. Banks paid total federal income taxes of $6,409.61, and that during each of the following six years Thomas W. and Reta L. Banks paid federal income taxes in the following amounts:

Year	Amount Paid
1942	$ 267.66
1943	17,366.35
1944	3,639.71
1945	131.17
1946	5,482.44
1947	9,565.66

Dated: May 24, 1952.

/s/ PHILIP NEVILLE
/s/ C. U. LANDRUM
/s/ MILES W. LORD
Attorneys for Plaintiff

/s/ A. JEROME HOFFMANN
/s/ JOHN W. GRAFF
/s/ RICHARD E. KYLE
Attorneys for Defendant"

Mr. Graff: Now, if the Court please, that information, as I understand it, is to cover the information which would otherwise have been contained in Exhibit 201.

Mr. Landrum: Yes, and that is what I have got this note about. I want to withdraw Exhibit 201. It has never been received, but we had it marked, and we would like to withdraw Exhibit 201.

The Court: The stipulation covers the facts?

Mr. Landrum: Yes, Your Honor.

Mr. Graff: Exhibit 201 was not received at all, Your Honor, and so this takes its place.

The Court: Well, you desire to withdraw Exhibit 201?

Mr. Landrum: Yes, Your Honor.

The Court: Very well.

Whereupon HOWARD W. MELBOSTAD, was recalled as a witness and, having previously been duly sworn, testified further as follows:

Mr. Lord: Your Honor, I believe, if the Court please, that subsequent to the time Mr. Melbostad was on the stand, the Government made certain inquiries of the witness who was on the stand and who had charge of the books and rec-

ords of Music Installations, Inc., and we believe that that witness' answers to the questions concerning the whereabouts of the books of Music Installations, Inc., have laid a sufficient foundation for the introduction into evidence of Government's Exhibit 214, which is a transcript of the books and records of that corporation made by Mr. Melbostad while the books were in existence, and so at this time, Your Honor, we re-offer into evidence Government's Exhibit 214.

Mr. Graff: If the Court please, my notes indicate that Mr. Weinstock was asked something concerning the books and records of Music Installations, Inc. He stated that he saw some books a couple of years ago and, as far as he knew, the books had been turned back to Mr. Shepard, and the book that he saw about two years ago was a ledger. Now, those are my notes of it and I submit they do not establish the necessary foundation for the introduction of secondary evidence.

Mr. Lord: If the Court please, I believe the record will show a return "Not found" for Mr. Shepard when the Marshal tried to serve him and that, as far as our information discloses, the other shareholder in that corporation was Mr. Banks, and therefore we do not need to offer any further evidence on this subject as far as laying a foundation for secondary evidence. If the books are in the hands of the defendant, he has them to cross-examine us on our secondary evidence.

The Court: Who had these books the last time—

Mr. Lord: Mr. Weinstock is the last man we know of who had the books. Other than that our inquiries have petered out. We don't know where they are and we have been frustrated in every attempt to obtain these books and other books, Your Honor.

Mr. Graff: Just a moment. I object to that statement, Your Honor.

The Court: Yes.

Mr. Lord: I withdraw it. I apologize.

The Court: What did Weinstock say he did with them, or what does he know about that?

Mr. Lord: As I recall, I believe Mr. Graff's statements are about correct. Mr. Weinstock once saw the books and he does not know where they are.

Mr. Graff: According to my notes, he saw the ledger—the reporter's record, of course, would be much more accurate than my notes—but my notes are that he saw some books a couple of years ago. He mentioned the ledger, specifically. He said he turned them over to Mr. Shepard. Now, that is what I think he testified to in substance.

Mr. Landrum: If Your Honor please, the Court will take judicial notice of its own record, and there was a subpoena duces tecum, as I understand the issues, for Mr. Shepard to produce these books and the Marshal has been unable to find him.

The Court: Where does he live, do you know?

Mr. Lord: He has two or three residences, as far as we are able to ascertain, Your Honor,—one at Osseo, Minnesota, one at Lake Minnetonka, and the Marshal has been to all those places and I believe the record shows a return "Not found" for Mr. Shepard, and we have had some difficulty in locating the business address of that corporation or finding anyone there who is competent to take service.

Mr. Graff: Let me ask this question: Has the subpoena which is directed to Mr. Shepard asked for the books of Music Installations, Inc.?

Mr. Lord: I believe that it does.

Mr. Graff: Well then, if that is the case, I don't see how they can claim they have established the foundation for Mr.

Weinstock now introducing secondary evidence, if they had the information that Shepard had the books.

Mr. Lord: Your Honor, we have been forced to look where ever we could.

The Court: Well now, let's terminate this discussion. As I understood counsel for the Government, you propose to prove that a transcript was made of certain records of Music Installations, Inc.?

Mr. Lord: Yes, Your Honor.

The Court: You may proceed.

Mr. Lord: We have offered in evidence, Your Honor, Government's Exhibit 214.

The Court: Has it been shown what Exhibit 214 is?

Mr. Lord: Yes, Your Honor, the witness earlier testified, if you recall, that he made a transcript of these certain books and records in 1946.

The Court: And that is Exhibit 214?

Mr. Lord: Yes, Your Honor.

The Court: When was that transcript made?

Mr. Lord: I believe he stated in the fall of 1946, Your Honor.

The Court: (To the witness) Is that correct?

The Witness: That is correct.

Mr. Lord: My purpose in bringing the witness back, Your Honor, is to further explain this in the event that the Court sees fit to accept it into evidence.

The Court: Let me see the exhibit.

(Government's Exhibit 214 handed to the Court.)

(Document handed to Mr. Hoffmann by the Clerk.)

Mr. Lord: I have asked for that exhibit, if Your Honor please.

The Court: Don't act like children.

Mr. Lord: Yes, Your Honor.

The Court: (To Mr. Hoffmann) You may examine that document. When you get through, hand it to Government counsel.

Mr. Hoffmann: I shall be most happy to do so, Your Honor.

Mr. Graff: May we have a moment, Your Honor, while we examine this subpoena?

The Court: Yes.

Mr. Graff: May I state my objections now to the exhibit, Your Honor?

The Court: You may.

Mr. Graff: With respect to Exhibit 214, we object to the reception of Exhibit 214 into evidence on the ground and for the reason that it appears that that exhibit is something which this witness copied from some books. There has been no showing here that the books from which it was purported to have been copied are not in existence, and therefore we submit that secondary evidence is not admissible. The objection is further made that the exhibit is hearsay and is immaterial and irrelevant.

The Court: (To the witness) Did you make Exhibit 214?

The Witness: I did, Your Honor, yes.

The Court: Was it in connection with your work of investigation?

The Witness: Yes.

The Court: Did you copy it from the books and records of Music Installations, Inc.?

The Witness: Yes,—from a ledger of Music Installations, Inc.

The Court: Did you copy it accurately?

The Witness: I believe I did.

Mr. Hoffmann: I didn't get the answer, Your Honor—

The Witness: I said I believe I did.

The Court: I asked him if he copied it accurately; he says he believes that he did. Is that the question you wanted to know about?

Mr. Hoffmann: I didn't get his answer to that question, Your Honor.

The Court: Very well. (To the witness) Did you have possession of the books of this concern at that time?

The Witness: I examined the books, yes.

The Court: That was in 1946, do I understand?

The Witness: Yes.

The Court: And you took the data and made this document, Exhibit 214, from the books and records of the concern?

The Witness: Yes. This exhibit was copied from the capital stock account and the surplus account of the books of Music Installations, Inc.

The Court: Who had custody of the books and records at that time?

The Witness: These books were furnished to me by Miss Jessie Beshears at 1316 Nicollet Avenue, Minneapolis.

The Court: Was that the place of business of this concern at that time?

The Witness: I believe it was. That is where the books were when I examined them.

The Court: Was Miss Beshears connected with the concern, so far as you know?

The Witness: I believe she was. She was the one that permitted me to examine the books.

The Court: And you left them with her?

The Witness: Yes.

The Court: And you do not know where they are now?

The Witness: No. After I finished with them, they were left right where they were when I got them, in the same building.

The Court: You haven't seen them since?

The Witness: No.

The Court: Now, counsel, do I understand that these books went into the hands of Harry Shepard?

Mr. Lord: Yes, Your Honor. I understand he was an officer of that corporation, along with the defendant.

The Court: Well, a subpoena was issued by him?

Mr. Lord: Yes, it was, Your Honor.

The Court: (Continuing) To appear and bring the books and records of that concern?

Mr. Lord: Yes, Your Honor.

The Court: It has not been served?

Mr. Lord: No, Your Honor. There was a return "not found" on it, Your Honor, and the subpoena has been outstanding for some time.

The Court: (To the witness) You produced Exhibit 214, did you?

The Witness: You mean, did I bring it into court? Is that what you mean?

The Court: Well, you made it?

The Witness: I made it originally, yes.

The Court: Have you kept it—

The Witness: No, I turned it over, turned it in at my office with the tax returns of Mr. Banks and other papers and—

The Court: You mean into the office of the Collector of Internal Revenue?

The Witness: Yes, to my superior.

The Court: It has been held in that office, so far as you know?

The Witness: Yes.

The Court: You don't know who produced it in court?

The Witness: No, other than it was with all the other papers in the case.

The Court: Well, you know you made this exhibit, 214?

The Witness: I know I made it.

The Court: Well, it is received.

Mr. Lord: You may examine, counsel.

Cross-Examination

By Mr. Graff:

Q. What books did you examine of Music Installations before you wrote up Exhibit 214?

A. The ledger,—general ledger.

Q. Do any of the entries on Government's Exhibit 214 refer to the years '45, '46, or '47?

(Government's Exhibit 149 as previously marked, now marked in addition 149-A, to 149-M, inclusive; Government's 152 as previously marked, now marked in addition 152-A to 152-I, inclusive; and Government's Exhibit 153 as previously marked, now marked in addition 153-A, 153-B, and 153-C.)

(Government's Exhibit 159, which was previously marked, now had added thereto, 159-A to 159-I, inclusive.)

(Government's Exhibits 216 and 216-A marked for identification.)

(Government's Exhibits 217 and 217-A marked for identification.)

(Government's Exhibit 148 as previously marked was in addition thereto marked as 148-A and 148-B for identification.)

(Exhibits 150, 160, 159, 159-A through 159-I, 153, 153-A, B and C, 147, 216, 216-A, 217, 217-A, 146, 148 and 148-A and 148-B are offered in evidence.)

Proceedings had in the foregoing entitled matter before the Honorable Robert C. Bell on May 26, 1952. Appearances are as has been heretofore noted.

Monday Morning Session, May 26, 1952, 10:00 o'clock A.M.

(Appearances as heretofore noted.)

Mr. Lord: If the Court please, at this time, I should like to withdraw certain exhibits which were previously offered and which, upon further examination the Government found not to be relevant at this time. These exhibits are Government's Exhibits 154, 155, 156, 157, 158, and 151.

Now, if the Court please, on our last session here the Government offered in evidence certain pages of Exhibit 149, marked as 149-A, 149-B, through 149-M, and I believe there are others here that I will go on to list, and the understanding was that counsel for the defendant was to have an opportunity to examine them and at this time I would like to re-offer them, and I would list them, if the Court please.

The Court: 149 and 149-A to M, inclusive.

Mr. Lord: Now, Government's Exhibit 152, which is a large book on the Blue Goose, and 152-A, -B to -I, inclusive, is now offered in evidence, Your Honor.

Government's Exhibits 153 and 153-A, -B and -C, are now re-offered if the Court please. Exhibit 150, which was offered in its entirety, we offer, 160 we re-offer, 159-A, -B, -C, through -I, we re-offer. 147 is offered in its entirety. 148, Your Honor, is re-offered, 148-A and -B are re-offered, Your Honor.

Government's Exhibits 216-A and 217 and 217-A are re-offered.

Mr. Graff: With respect to the exhibits which counsel has just referred to, Your Honor, I think probably the easiest way to handle it would be to indicate to the Court as we did on Saturday last that we had no objection to the foundation with respect to all of these exhibits. We do, however, wish to make our objection on the ground of their being irrelevant and immaterial. I appreciate the fact that the Court is relying upon counsel, indicating that they will connect it up. However, this morning there were a whole group of exhibits which were withdrawn. Now, we should like to have reserved to us the right to interrogate whatever witnesses may appear with respect to these exhibits, and go into the question of their materiality and their relevancy, and if it should later appear that they are not material and relevant, to move the Court to strike them from the record.

The Court: Very well. The first numbered exhibits that are offered this morning, I believe begin with Exhibit 146. I think that relates to the Flour City Body Corporation affairs,—146, 147, and 149, and 149-A to -M, inclusive, are received. 148-A and 148-B are received.

The next group of exhibits I think relate to the Blue Goose and associate matters numbered Exhibits 150, 152, and 153, 153-A, -B and -C.

152-A to -I, inclusive, those exhibits are received, those I named, except 151,—with the exception of those withdrawn by counsel for the Government.

I understand Exhibits 154, 155, 156, 157, and 158 are withdrawn. Exhibits 159 and 160 are received. I believe that covers the offers made at this time, except we have 216, 217 and 217-A. I believe they were offered.

Mr. Lord: Yes, Your Honor. They relate to the Flour City Body Corporation. May I inquire as to whether or not you have ruled on 153-A, -B, and -C, Your Honor? We have re-offered that, too.

The Court: Those exhibits are received.

Mr. Lord: Now, Your Honor, with respect to Exhibit 159, Your Honor, that had sub-numbers -A through -I, and I believe the Court may not have mentioned those sub-numbers when you admitted that exhibit.

The Court: They are received.

GEORGE H. MCKUSICK, was recalled as a witness and, having previously been duly sworn, testified further as follows:

Direct Examination

By Mr. Lord:

Q. You are the Mr. McKusick who testified here before under oath, are you not?

A. I am.

Q. Now, Mr. McKusick, you stated that you made certain investigations with reference to Mr. Banks' affairs, did you not?

A. I did.

Q. In the course of your investigation did you have occasion to refer to the books and records of the firm Banks & Shepard?

A. I did. I made an examination—

The Court: Proceed.

Q. Now, where did you see these books?

A. I made a request of the accountant L. H. Weinstock, and he stated that he did not —

Mr. Graff: Just a moment. We object to anything that Mr. Weinstock may have stated to this individual on the ground that it is hearsay and not responsive to the question which was asked.

The Court: The objection is sustained.

Q. (By Mr. Lord) Where did you see the books, Mr. McKusick?

A. They were brought to my office at 208 Builders Exchange.

Q. And who brought them there? A. L. L. Peterson.

Q. Did you examine them? A. I did.

Q. About what date was that, Mr. McKusick?

A. '49 or '50.

Q. What did your examination consist of?

A. I was particularly concerned with the—

Mr. Graff: Well, just a moment. I do not care to have the witness characterize his testimony, Your Honor.

The Court: Just tell what examination you made, what you examined.

Q. (By Mr. Lord) What did you look at?

A. Rita L. Banks' investment account.

Q. Did you find Rita L. Banks' name in the investment account?

A. I did.

Q. What did you do with the books?

A. I had the sheets which were Rita L. Banks' investment account photostated.

Q. Where did that photostating take place?

A. In the Government office in St. Paul.

Q. Did you have occasion to compare those photostats with the original books?

A. I did.

Q. How many sheets did you have photostated?

A. Two.

Q. Were there other sheets that had to do with the investment account of Rita Banks?

Mr. Graff: Just a moment. I will object to that on the ground it is immaterial as to what Rita Banks may have had. This case concerns Tom Banks, as I understand it.

The Court: You may answer.

The Witness: Repeat the question, please.

Mr. Lord: Would you read the question, Mr. Reporter.

(The question was read.)

Mr. Graff: Just a moment. Just in the event, Your Honor, that there should be further questions as to Rita Banks, may we have a standing objection as to the incompetency and irrelevancy of such testimony without the necessity of taking it each time her name is mentioned?

The Court: That is agreeable to the Court. There is a question pending, I believe, is there? You may read it, Mr. Reporter.

(The question was re-read.)

A. Yes.

Q. (By Mr. Lord) Did you make a computation of the investment account of Rita Banks?

A. Yes.

Q. (By Mr. Lord) What pages did you refer to in making that computation?

A. The page which carried the balance for the calendar year ending 1941, and the page which carried the balance for the calendar year ending 1942.

Q. Were they the pages which you photostated?

A. They were.

Q. And what were the other pages? What years were they concerned with?

A. The years subsequent to the period of my investigation.

Q. And by that you mean what?

A. '48 and '49—part of it.

(Government's Exhibit 218, consisting of two sheets, marked for identification.)

Q. Mr. McKusick, I show you Government's Exhibit 218. Will you tell me what that is?

A. That is a photostatic copy of Rita L. Banks' investment account in the partnership known as Banks & Shepard.

Q. What is the second page on that exhibit?

A. The second page of the exhibit carries the balance for the year—calendar year ending 1943.

Q. And the first page is what years?

A. The first page carries the balance for 1941 and 1942.

Q. Are those the photostats which you prepared—

A. (Interposing) They are—which I had prepared.

Q. Explain that, if you please.

Q. When the Government has photostats made, the employees simply send the material to be photostated to the office in St. Paul and the actual photostating is done under the direction of the St. Paul office.

(Government's Exhibit 219 marked for identification.)

Q. Mr. McKusick, did you make an examination of those books with reference to the balance for the year ending 1943?

A. I did.

Q. State whether or not you prepared a phototstatic copy of the page containing that balance?

A. I did.

Q. I show you Government's Exhibit 219. Will you tell me what that is?

A. That is a photostatic copy of the ledger sheet showing Rita L. Banks' investment account in the partnership Banks & Shepard for the calendar year ending 1944.

Q. Were Government's Exhibits 218 and 219 compared with the original books of the Banks & Shepard partnership?

A. They were.

Q. Did you find them to be accurate reproductions of the figures contained on those pages?

A. I did.

Q. Did the books from which you drew those photostats appear to be—were they given to you as books of the Banks & Shepard corporation?

A. They were.

Q. Partnership, correction. A. They were.

Q. Did they appear to be regular business records?

Mr. Graff: Just a moment. That is objected to as hearsay and not the best evidence.

Mr. Lord: I am asking what they appeared to be.

Mr. Graff: Also asking for a conclusion and not a statement of facts.

The Court: You may answer.

A. I asked for their books of original entry. These books were produced.

Mr. Graff: Well, I move that that is not responsive, Your Honor. I move it go out for that reason.

The Court: The motion is overruled.

Q. (By Mr. Lord) Mr. McKusick, do you know where the books and records of Banks & Shepard are?

A. I do not.

Q. When did you last see them?

A. At the time that I had the photostatic copies prepared.

Q. Do you know who are partners in the Banks & Shepard partnership?

Mr. Graff: Well, just a moment. I presume that that is not the best evidence and it is hearsay as far as this witness is concerned.

The Court: Well, of course, there is better evidence, unquestionably, than that which you are now seeking.

Mr. Lord: If the Court please, I propose to lay a foundation for the introduction of these documents as secondary evidence and my inquiries were to the effect as to where we might obtain the best evidence.

The Court: I think it is incompetent as to the hearsay evidence given by this witness. Proceed.

Mr. Lord: At this time, Your Honor, we offer in evidence Government's Exhibit 218 and 219.

(Exhibits handed to Mr. Graff.)

Mr. Graff: May I have a few moments to examine them, Your Honor?

The Court: Yes.

Mr. Graff: May I ask a few questions, Your Honor, pertaining to the exhibits?

The Court: To the foundation?

Mr. Graff: Yes, Your Honor.

Q. (By Mr. Graff) Mr. McKusick, what did I understand you to identify Exhibit 219 as?

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A. I do not—you would have to show me the exhibit. I do not remember them from their Exhibit number.

(Document handed to the witness.)

A. I believe I identified that as the photostatic copy of the ledger sheet carrying the balance of Rita L. Banks' investment account for the calendar year 1944.

Q. And directing your attention to the top of Exhibit 219, doesn't the word "inventory" appear?

A. The inventory—

Q. (Interposing) Doesn't it? A. It does.

Q. Now, do you know who wrote this in here "net worth investments"?

A. I do not.

Q. Directing your attention to Exhibit 218, the words, the letters, "Inv." also appear, do they not?

A. That is right.

Mr. Graff: Now, if the Court please, at this time we will object to Exhibits 218 and 219 for several reasons. The first is that they appear to be photostats. We submit that before any secondary evidence can be admitted, the necessary foundation has not been laid, at least, not to my knowledge. They are objected to for that reason. They are objected to on the further reason that I think that they have not been described correctly by this witness, and for the further reason that these appear to be all pertaining to Rita Banks. We object to them further on the ground that they are irrelevant and immaterial to the triable issues in this case.

(Documents handed to the Court.)

The Court: Was any effort made to produce the original records in this matter?

Mr. Lord: Yes, Your Honor, we have returns on file of this partnership, Government's Exhibit 24, 25, 26, and 27, showing Rita Banks and Harry Shepard as partners in the Banks & Shepard partnership. We have attempted to sub-

poena Harry Shepard unsuccessfully for some period of time, and we submit that that showing, together with the fact that the books and records of this partnership must be construed to be in the hands of either Mr. Shepard or the wife of this defendant, and they are available to them to produce, and we submit that that should be sufficient foundation for the introduction of this secondary evidence. The agents have diligently searched.

Mr. Graff: If the Court please, there are certain tax returns in here of this partnership. There is no evidence in this record that I know of that shows a continuation of this partnership which counsel apparently assumes. Now, with respect to the question of the secondary evidence, simply to come in court and say, "Well, we have not got it," is not sufficient under the rule as I understand it, and I submit that necessary foundation for the introduction of secondary evidence has not been laid. Now, the Government had these books. Apparently they had them because they claim they were able to make certain photostats, so apparently they were in existence. Now, they have not accounted for the existence, and they have not laid the necessary foundation.

The Court: The exhibits are received.

Q. (By Mr. Lord) Mr. McKusick, in the course of your investigation of this matter, have you had occasion to contact the firm known as the "Coin-A-Matic Amusement Company"?

A. I did.

Q. Did you find where they kept their books? A. I did.

Q. Where was that?

Mr. Graff: May we have the time and place identified?

Mr. Lord: We propose to do that, Your Honor.

The Court. Just proceed.

A. They were in the possession of the accountant L. L. Peterson.

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Q. (By Mr. Lord) And where was his office?

A. He operated from his residence, and I do not recall the residence address.

Q. Did you obtain the books for examination?

A. He brought them to 208 Builders Exchange, our former office.

Q. At about what time?

A. I would say it was possibly in 1949.

Q. You would say it was possibly in 1949. Can you give us a more definite date?

A. The latter part of 1949.

Q. Did you then examine the books? A. I did.

Q. With reference to what particular portions of the books did you make the examination?

A. For the accounts of Harry Shepard and T. W. Banks.

Q. Did you have occasion to—what did you do with the books?

A. I made a computation with respect to the investment account of Harry Shepard to ascertain—

Mr. Graff: Well, just a moment. I submit the question has been answered.

The Court. Yes, you might stop where you are. Counsel may make further inquiry.

Q. (By Mr. Lord) Mr. McKusick, in the course of your investigation, did you determine what investment, Banks had in that venture?

Mr. Graff: Just a moment. That is objected to as calling for a conclusion and not the best evidence.

The Court: Have you any record to show? Can you lay a proper foundation?

Mr. Lord: Yes, Your Honor, I will withdraw that question.

Q. (By Mr. Lord) Did you take any sheets out of the books of that venture?

A. I did.

Q. What did you do with them?

A. I sent them to St. Paul to have photostatic copies made.

Q. How many sheets did you withdraw?

A. I would say offhand three.

Q. What particular account were those sheets concerned with?

A. Two were for the investment account of H. Shepard. One was the investment account of "T.B."

Q. And what years were concerned,—were shown by those three pages?

A. They covered the calendar years—Harry Shepard's account covered the calendar years '41 to '44, inclusive. The investment account of "T.B." covered the calendar year 1945.

Q. Were those sheets of the books then returned to you?

A. They were.

Q. What did you do then with them?

A. Replaced them in the order of their ledger and returned them to accountant L. L. Peterson.

Q. Approximately on what date was that?

A. It might have been—it was early 1950.

Q. You do not remember the exact date?

A. I do not.

Q. While those books were still in your hands, did you receive the photostats?

A. I did.

Q. Did you compare them with the original pages of the books?

A. I did.

(Government's Exhibit 220, consisting of three parts, marked for identification.)

Q. (By Mr. Lord) Mr. McKusick, I show you Government's Exhibit 220. Will you tell me what that is?

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A. It is a photostatic copy of the investment account of H. Shepard in the partnership known as "Coin-A-Matic."

Q. And the first page thereof,—can you identify that?

A. I can.

Q. What year does it cover?

A. The first page covers the calendar years ending—1941, 1942, 1943.

Q. (By Mr. Lord) And the second page, what year endings does that cover?

A. The calendar year ending December 31, '44.

Q. And the third page?

A. The third page shows the investment account of "T. B." in the Coin-A-Matic Amusement Company for the calendar year ending 1945.

Q. Mr. McKusick, do you know where the books and records of the Coin-A-Matic Amusement Company are at this time?

A. I do not.

Mr. Lord: At this time, Your Honor, we offer in evidence Government's Exhibit 220.

Mr. Graff: Now, if the Court please, with respect to Exhibit 220, consisting of three parts, I would like to make the following objections: First, we object again that this is secondary evidence. The necessary foundation for admission of secondary evidence has not been laid. This witness has just admitted on the witness stand that he does not know where the books are. Now, as part of the foundation they have to be accounted for. Secondly, I object to it on the ground that it is irrelevant and immaterial. It appears that the first two parts pertain to a man by the name of Shepard. Now, it does not appear, at least at this time, how material or how relevant that may be. Now, there has been no identification except the initials "T.B." as referring to this defendant. They happen to be his initials, first and last, but

there has been no showing that this represents a page in the book as far as he is concerned.

The Court: The exhibit is received.

Q. (By Mr. Lord) Mr. McKusick, in the course of your investigation, did you have occasion to examine the books and records of McCarthy's St. Louis Park Cafe, Incorporated?

A. I did.

Q. When?

A. Originally I think the first year I was in, 1946.

Q. Did you see the books then? A. I did.

Q. When did you next see them?

A. In the latter part of '49.

Q. Where?

A. They were brought to 208 Builders Exchange Building.

Q. And who brought them there?

A. One of the employees of McCarthy's.

Q. Did you then make an examination of the books?

A. I did.

Q. With reference to what particular accounts did you make an examination?

A. Rita or Thomas W. Banks.

Q. What particular portions of the books did you examine with reference to Rita L. or Thomas Banks?

Mr. Graff: I object to the question insofar as it pertains to Rita Banks on the ground that it is incompetent, and immaterial.

The Court: You may answer. The objection is overruled.

A. The accounts entitled "Rita L. Banks, Advances from officers, or advances from stockholders"—

Q. (By Mr. Lord) Let me ask, was it either or both?

A. Either.

Q. How was the column headed, do you remember?

Mr. Hoffmann: If the Court please, objection is taken to the witness' further testimony on this line of inquiry because of the fact that the Government has by its own exhibits adduced here and had received by the Court, the books that the witness pretends to be testifying from, and we submit the books are the best evidence.

The Court: I am not sure that that is correct. What about it?

Mr. Lord: If the Court please, the books are not self-explanatory and we propose to adduce through Mr. McKusick's testimony that he and Mr. Weinstock together explained certain entries in those books. They worked them out together.

The Court: Have you the books?

Mr. Lord: Yes, Your Honor, the books are here. They are in evidence. However, I think that Mr. McKusick's testimony would be very helpful to explain certain entries in the books which otherwise would not be explainable.

The Court: It would seem very proper to have the books and have the explanations made in connection with the books.

Mr. Lord: Yes, Your Honor. We will do that.

Q. (By Mr. Lord) Mr. McKusick, I will ask you to examine this stack of books here, which we have introduced in evidence, and to take from it the particular books which you examined with reference to McCarthy's Cafe.

A. (Witness complies.)

Q. Now, will you look on the reverse of that book and tell me what exhibit you have, Mr. McKusick?

A. Government's Exhibit 159, which is the general ledger of McCarthy's St. Louis Park Cafe, Incorporated.

Q. And now the particular page to which you propose to refer, Mr. McKusick, will you tell me what exhibit number that is?

A. Government's Exhibit 159-I, entitled "Stockholder's Advances, account No. 40". It shows the following credit:—

Q. To whom? A. I will describe them.

Mr. Graff: Are you reading from the exhibit, Mr. McKusick?

The Witness: Yes. "August 31, 1942."

Mr. Graff: Just a moment. I assume that the exhibit speaks for itself, Your Honor.

The Court: Certainly, but this witness may use it in his testimony. Proceed.

Q. (By Mr. Lord) Mr. McKusick,—

Mr. Landrum: Go ahead.

A. "August 31, 1942, T. Banks, folio 3, $2,000.00. August 31, 1942, T. Banks, folio 3, $5,346.14. February 28, 1943, T. W. Banks, folio 46, $1,000.00. March 31, 1943, T. W. Banks, with the notation February 2, following, folio No. 53, $1500.00. March 31, T. W. Banks—" now, that word is just "Bank" singular. There is no "s" on the end of it,—"T. W. Bank, folio No. 54, $2,000.00." Government's Exhibit 159-F entitled "Notes payable individual," ledger account 52-1. Entry October 31,—

Mr. Graff: Pardon me, a moment, Mr. McKusick. May we have an objection, Your Honor, to the witness reading from the exhibit? And may it be made to all of it without the necessity of repeating it each time?

The Court: There was something about the witness said explaining the books or certain entries in the books. You may proceed.

Mr. Hoffmann: Mr. Reporter, will you give the ledger account number?

The Court: 52-1, I think it was.

A. October 31st—

The Court: What year?

The Witness: There is no year designated, Your Honor.

The Court: Is there anything above that designates the year?

The Witness: Below it there is a date stamped "January 31, 1945", but I was going to read that in the sequence.

The Court: Why, very well, proceed.

The Witness: Read that back, will you?

(The answer was read as follows: "October 31.")

A. "(Banks advance,) R. L. $3,500.00."

A. Government's Exhibit 159-D, entitled "Notes payable", Morris Ring, which is cancelled by a line being drawn through it and an entry, 'Rita L. Banks" written beside it, —obviously two different individuals wrote the notations.

Mr. Hoffmann: Just a moment. I move that be stricken, Your Honor, as characterization of an instrument already received in evidence and thereby invading the province of the jury.

The Court: Oh, yes, that clause may be stricken,—that is, the comment about the handwriting in the book.

A. "Ledger sheet 52-2,"—this entry is October 31, 1946. In pencil, "T.R.S.S." to Rita Banks. In ink, "7-31-47, folio 37-4, $10,000.00." Government's Exhibit 159-C bears the stamp, "McCarthy's Cafe, Incorporated, 5601 Wayzata Boulevard, St. Louis Park, Minn." The ledger sheet is headed "Notes payable-individuals." It bears the ledger sheet number 52-1. "August 1, 1946," there is a notation in pencil, "R. L. Banks, $3,500.00."—"K. Mc. $4,000.00," and "T. J.C. $5,000.00." The $5,000.00 is circled in ink. The sheet begins with a balance of $12,500.00 shown owing to these undescribed individuals. The next entry is November 30, '46, "Tranfer to Bank", B-a-n-k, "Number 52-?,—folio 46,

$15,000.00." There is a date stamp, December 31, '46, which is canceled out in ink.

The next entry is December 31, 1946. In pencil, "12-16-46", Number 7497, and in ink "T. J. C.", folio No. 52 shows a debit of $5,000.00. All the entries I have been reading heretofore were credits.

The next entry, January 31, '47. In pencil, "Brady's Bar." In ink, "Folio 61-2," a credit of $5,000.00. It says, "To balance" in red ink, $12,500.00.

Government's Exhibit 159-A, bears the stamp "McCarthy's Cafe, Inc., 5601 Wayzata Boulevard, St. Louis Park, Minn." The sheet is headed, "Notes payable—individuals." It bears the ledger account number 52-1. It begins with the ink notation, 1947, August 1, balance, "R. L. B. $13,500.00,—and K. Mc C.",—it looks like it might be—that is my interpretation—$4,000.00. "Brady's Bar, Inc., $5,000.00. Total balance, $22,500.00."

August 31, 1947, "R. L. B.", a debit, $10,000.00.

September 30, '47, in ink, "M. Creay," and in pencil a notation—it looks like the numeral 2 with a capital "B" or a capital "T. B.", credit $25,000.00. Then the date October 31, 1947, shows and it was not used. In pencil the year 1948. "March 31," in pencil, "1948, deposit, $15,000.00. To balance, $52,500.00." The corporate records entitled "McCarthy's Cafe, numbered Government's 160, which includes the corporate minutes as well as the stock certificate register shows the following stock certificates issued to Rita Banks:—

Certificate number 6, dated May 31, 1944, calling for 80 shares, issued to Rita Banks. The record is uncancelled.

Certificate No. 10, dated June 1, 1944, calling for two and a half shares, issued to Rita Banks, which is uncancelled.

Mr. Graff: May we have the same objection, Your Honor, as to any testimony concerning Rita Banks without the necessity of taking it all the time?

The Court: That may be understood.

A. Certificate No. 14, dated 5-5-50, calling for 27½ shares, issued to Reta Banks which remains uncancelled.

Q. (By Mr. Lord) Did you discuss these matters with the man in charge of the books?

A. I did.

Q. Did you make a computation? A. I did.

Q. Does that show the investment of Rita Banks in McCarthy's St. Louis Park Cafe?

A. It did.

Q. And for what years?

A. The years,—each year in the period 1942 through 1947.

Q. Did you reduce your computation to writing?

A. I did.

Q. Did you show it to Mr. Weinstock?

Mr. Graff: Objected to as immaterial.

The Court: You may answer that question.

A. I did.

Q. (By Mr. Lord) After showing it to Mr. Weinstock, did you make any changes on it?

Mr. Graff: Just a moment. Objected to as immaterial.

The Court: You may answer that question.

A. I did.

Q. (By Mr. Lord) After you made the changes, did you show it to Mr. Weinstock?

Mr. Graff: That is objected to as immaterial.

The Court: You may answer.

A. I did.

(Government's Exhibit 221 marked for identification.)

Q. (By Mr. Lord) Mr. McKusick, I show you Government's Exhibit 221, marked for identification,—can you tell me what that is?

A. It is an analysis of funds invested in McCarthy's St. Louis Park Cafe.

Q. Does that show the investment account of Reta Banks that you just described?

A. It does,—"Thomas W. or Reta Banks."

Q. Does that contain your analysis of the figures which you have just read to the Court?

A. It does.

Mr. Lord: At this time, Your Honor, insofar as it pertains to the investment account of Rita Banks and Thomas Banks we offer in evidence Government's Exhibit 221, and only insofar as it pertains to these accounts.

Mr. Graff: If the Court please, I am sure the Court appreciates it would take some time to examine this exhibit or, shall I say, proposed exhibit.

The Court: You can do that during the luncheon hour perhaps.

Mr. Graff: Thank you. May I, however, just ask the witness a question or two pertaining to the exhibit now?

The Court: Well, if it pertains to the foundation.

Mr. Graff: It does, Your Honor.

The Court: You may make the inquiry at this time.

Q. (By Mr. Graff) You testified on direct examination that you showed Exhibit 221 to Mr. Weinstock?

A. I did.

Q. On two occasions,—is that correct?

A. That is right.

Q. Can you tell me when the first occasion was, approximately?

A. I think it was in connection with the transfer of the Morris Ring account to Rita Banks.

Q. No, I mean the date when you had completed Exhibit 221 and showed it to Leonard Weinstock the first time — about when was that?

A. I cannot say offhand.

Q. Can you tell me when it was that you showed it to Leonard Weinstock the second time?

A. Oh, the latter part of 1949.

Q. I see.

A. Or the fore part of 1950.

Mr. Graff: I have no further questions at this time, Your Honor.

The Court: Very well, you may proceed, counsel.

Q. (By Mr. Lord.) Now, Mr. McKusick, you have stated that you started this investigation in 1946, is that correct?

A. Right.

Q. Will you sketch for us briefly what you did in the course of your investigation?

A. We —

Mr. Hoffmann: (Interposing.) If the Court please, that is objected to as repetitious. The witness on Monday or Tuesday of last week testified to that as part of his then direct examination.

The Court: Well, he may answer this question. Possibly counsel intends to bring out something new.

A. We examined —

Mr. Hoffmann: Interposing.) If the Court please, I presume the question, in any event, calls for what he did and not what, quoting "We did."

The Court: He may have been working in cooperation with others. You may proceed, Mr. Witness.

A. We who were working on the special investigation were divided up into squads of two each and we examined every cashier's check, bank money order, and certified check in any bank in which it was determined that Mr. Banks had a banking account or that he had a transaction there. If we proved that he bought one bank money order, then we would examine all the bank money orders. If he had one check certified, we examined all the certified checks. We also examined the same data in other banks where Mr. Banks did not have transactions that we knew of. We examined all broker accounts. We examined all public records. We correlated all of the money orders, cashier's checks, certified checks, brokerage records, — in other words, all of the information that we had obtained from any source whatsoever. After classifying the various matter, we arrived at the conclusion —

Mr. Hoffmann: (Interposing.) Now, if the Court please—

The Court: Do you have an objection?

Mr. Hoffmann: I do not presume he should give his conclusion. That certainly is hearsay — "we arrived at the conclusion."

A. I decided —

Mr. Hoffmann: (Interposing.) The same objection whether he decides it or anyone else. I do not know that this witness posesses any more authority than any other individual to state his conclusions in court.

Mr. Landrum: I think he will explain what the situation is, Your Honor. I think I know the purpose of his saying that.

The Court: Well, you might eliminate your conclusion and state what you found after all those examinations.

The Witness: We found that a preponderance of the taxpayer's financial transactions were consummated without reference to a bank account whatsoever. That a —

Mr. Graff: (Interposing) Just a moment, I move that go out on the ground that it is incompetent, a conclusion of this witness and not the best evidence. It is a conclusion on the part of this witness entirely.

The Court: The motion is denied. I think the witness is competent to state the substance of the answer given by him.

Q. (By Mr. Lord.) Mr. McKusick, I believe you were telling what you did, were you not?

A. I discovered that the taxpayer — now, this is in an instance of entering into financial transactions without using a bank institution.

Mr. Graff: Well, now, just a moment. I am going to object to that testimony on the ground, Your Honor, that it is not the best testimony; that it is a conclusion formed by this witness; that there is other competent evidence available, if it is the fact. It is a conclusion on the part of this witness.

The Court: I think the witness is stating what he discovered from the books, is that correct?

The Witness: No, Your Honor, it is a statement of what we discovered in our inquiries at various banking houses and other financial institutions.

Mr. Graff: I make the further objection that it is hearsay.

The Court: I think I will let the record stand as it is. Proceed.

A. (Continuing.) I discovered that the taxpayer would, buy a cashier's check with currency, use the currency or use the cashier's check to buy property, sell the property, use the proceeds of the property to buy War Bonds and cash the War Bonds to buy listed stocks, — in other words that the skein of three or four transactions would be consummated without having deposited money in or withdrawn money from the bank account.

Mr. Graff: If the Court please, I move that the answer of this witness be stricken because it appears that it is a sheer conclusion of this witness; that it is hearsay as far as he is concerned and is not a statement of fact, but is a conclusion on the part of this witness.

The Court: The motion is overruled. The facts ascertained by this witness by an examination of these books and records tend to prove or disprove the question of intent.

Mr. Hoffmann: If the Court please, I think the record should show on behalf of the defendant the further objection that if what the witness on the theory outlined by the Court testified to was permitted, on that basis, that he went beyond that and attempted to characterize what he claims — characterize what he claims to have been the effect.

The Court: Have you any books or records to show what you have just stated in your last answer?

The Witness: Your Honor, there are records entered in the court which related to skeins of such transactions.

Mr. Hoffmann: Now, if the Court please, that is the very word that the defendant takes exception to. I submit that this witness —

The Court: (Interposing.) The word may be stricken.

Mr. Hoffmann: And I ask that the word as used in his previous answer be stricken and in both instances we ask the Court most respectfully to admonish the jury to disregard the use of those words or his characterization of the transactions by the use of those words.

The Court: You have reference to his statement of "schemes"?

Mr. Hoffmann: That is correct.

The Witness: I beg your pardon, it was skein, not scheme —

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Mr. Hoffman: The same objection, Your Honor.

The Court: That is the method or procedure followed by the defendant, I take it, from what you said?

The Witness: That is right, Your Honor.

The Court: I think with that explanation the answer may stand as given.

Mr. Graff: I hesitate to interrupt again, Your Honor, but we are doing our best as we see it here to protect this record and I must most respectfully object to the statement that the Court just made in addressing the question to the witness as I do not think that that statement is borne out by the record at the present time.

The Court: Well, I directed my remark to this witness so that he might set us right on the meaning of the word that he used. I thought I knew what it was and he has stated that I did, or that my interpretation was correct. That is correct, is it?

The Witness: It is "skein." I did not say "scheme."

The Court: I understand that now and I think the jury understands that you did not say "scheme."

The Witness: I never did.

The Court: And you did not use the word "device"?

The Witness: No.

The Court: It was the method that you were describing?

The Witness: That is right, a chain of events.

The Court: I think that is not objectionable. The objection is overruled. You may proceed.

The Witness: I think that is about all I have.

Q. (By Mr. Lord) Did you make inquiry to ascertain whether or not Mr. Banks had during the period 1937 to 1947 inherited any substantial sums of money?

A. I did.

Q. What did your inquiry disclose?

Mr. Graff: Just a moment. I object to that as not being the best evidence.

The Court: Have you any books or records giving answer to that question?

The Witness: No, Your Honor — there was nothing found, so I could make no record, — and no reference to any record.

The Court: Are you still objecting?

Mr. Graff: Well, I do not think that proper foundation has been laid for the witness to answer that question, Your Honor.

The Court: As I understand it, he found nothing. You may proceed.

Q. (By Mr. Lord.) Did you make inquiry to ascertain whether or not during the period 1937 to 1947 Mr. Banks had received any substantial gifts?

A. We made such efforts and found nothing.

Mr. Graff: Well, I move the answer go out for the purpose of making an objection.

The Court: You may make your objection.

Mr. Graff: It is objected to on the ground that there has not been sufficient foundation laid to permit this witness to answer the question.

The Court: The objection is overruled.

Q. (By Mr. Lord) Mr. McKusick, during the course of your investigation did you look for safety deposit boxes in the name of this defendant?

A. I did.

Q. Did you find any? A. I did.

Q. Did you examine the contents of them?

A. I did not.

Mr. Graff: Well, again I presume, Your Honor, that the best evidence of that is not the testimony of this witness. I move the answer go out as not being the best evidence.

The Court: The motion is denied.

Q. (By Mr. Lord.) Mr. McKusick, did you attempt to ascertain how much, if any, cash Mr. Banks had on hand as of July 2, 1937?

A. I did.

Q. Were you successful in finding the answer to that question?

A. I was not.

Q. Did you find any evidence of any substantial cash in his possession on that date?

A. No.

Q. Now, I hand you Government's Exhibit 70. Will you read the first question and the answer to that question?

Mr. Graff: The exhibit, I presume, is in evidence, Your Honor, and it speaks for itself.

The Court: Well, I suppose it is given to the witness to refresh his recollection or to ascertain the data contained in it anyway.

Mr. Lord: That is correct, Your Honor.

Mr. Landrum: What is that exhibit?

The Witness: A list of questions that I submitted to Mr. Joseph A. O'Gordon for answer by his client, T. W. Banks.

Q. (By Mr. Lord.) And are the answers which he gave you contained on that sheet?

Mr. Graff: Well, now, by "he," you mean whom?

Mr. Lord: Mr. O'Gordon for Mr. Banks.

Mr. Graff: Well, now, I will object to it on the ground that there has not been any evidence substantiating that statement.

The Court: Read that question, Mr. Reporter.

(The question was read.)

The Court: The objection is overruled.

A. They are.

Q. (By Mr. Lord.) Read the first question and the answer thereto, if you have an answer.

A. "How much cash did Mr. Banks have on hand July 2, 1937?" No answer.

Q. The second question?

A. "Does the acquisition —."

Q. (Interposing.) No, wait a minute. What is the second part of the first question?

A. B of question 1, that is: "How much cash did Reta Lee Banks have on hand July 2, 1937?" No answer.

Q. Did you make any inquiry of Mr. Banks with reference to cash on hand as of the end of 1947?

A. I did.

Q. In what document did you make that inquiry?

A. Government's Exhibit 70.

Q. Is that the same list of questions and answers to which you just referred?

A. It is.

Q. Now, would you read the question and the answer please?

A. Question No. 20: "How much cash was in possession of Thomas W. and/or Reta L. Banks as of December 31, 1947?" No answer.

Q. Now, Mr. McKusick, I believe you previously stated that you used the net worth method in arriving at your determination of Mr. Banks' income for the years herein question, did you not?

A. I did.

Q. Can you briefly and in simple words explain the pattern of the net worth method which you used in this case? Let us start with the beginning net worth, if you please.

Mr. Graff: Well now, if that question calls for the use of books, documents, or records, I would like to have the witness refer to them.

The Court: He is first going to explain the net worth method of arriving at net income, as I understand it.

Mr. Graff: Well, I think if I heard the question correctly, it was a little broader than that, Your Honor. I think it directed his attention to a beginning period so that is more than just the so-called method.

The Court: Read the question, Mr. Reporter.

(The question was read.)

The Court: You may answer.

A. The net worth system is used where the taxpayer's method —

Mr. Graff: (Interposing.) Just a moment. I object to that answer, Your Honor. As I understand it, the question is as to the method. Now, I think he should answer then, the method. But he is now trying to point out what particular cases he thinks it should be used, which is a different situation.

The Court: No, I do not understand that to be the answer. Proceed.

A. (Continuing.) The net worth system is used where a taxpayer's method of reporting his income is inconsistent with the records which the taxpayer kept, or if the taxpayer kept no records. In this instance I made inquiry —

Mr. Graff: (Interposing.) Well, now, just a moment, Your Honor. That I again submit is not a general description of a so-called net worth method. He is again coming

down to the facts in this case. The question, as I understood it, was on the so-called net worth method.

The Court: Well, you might explain further in a general way how the net worth is obtained.

The Witness: In applying the net worth system or method, we, as investigators, add all of an individual's assets, — his real estate, money owed him by individuals, deposits in bank accounts, and anything of value that he has, — taking each such item at its acquisition or cost, not at its market value. We then ascertain how much that taxpayer owes, — the mortgage on his home, what he owes to other individuals for loans, — in other words, all of his liabilities. We subtract the liabilities from the assets to arrive at what is called "net worth." We do that for each year of the period being examined. The next step is to subtract the taxpayer's net worth at the end of a given year from his net worth— or we subtract the taxpayer's net worth at the beginning of the year from his net worth at the end of the year to arrive at increase in net worth. We compare the increase in net worth with what that taxpayer reported on his income tax return. If that taxpayer has had more money at his disposal in that calendar year than he has reported for income tax purposes in that year, he is in trouble.

Mr. Graff: Well, now, just a moment. I object to that answer and move that it go out and that this witness be directed to refrain from making such statements in the future and that the —

The Court: (Interposing.) Oh, the last phrase of the answer may be stricken. That is, "he is in trouble" may be stricken. It may be disregarded by the jury.

The Witness: If that taxpayer cannot account for the excess of net worth in that year over what he has reported for income tax purposes, either by inheritance, by gifts from someone else, or from any other source, then he is

required to explain the difference. There are further adjustments to this net worth, too. After we get the increase in net worth on any given year, we add to that the Federal income taxes paid, because that part was expended. He could not have that invested in real estate and notes and pay his taxes with it. There is another adjustment,—his living expenses. He first has to live. After that he invests money. Then we make an adjustment for the nontaxable portion of capital transactions. A man pays a tax on actually only 50 per cent of the profit in a capital transaction. In the end we arrive at what a man's actual increase in net worth is in any one year.

Q. (By Mr. Lord) Mr. McKusick, in the practice of the agents in the Bureau of Internal Revenue, do you attempt to find some definite net worth at a given period to start such an analysis?

A. We generally do.

Mr. Graff: Well, I submit that is not responsive, Your Honor.

The Witness: We do.

The Court: That is more responsive.

Mr. Graff: Well, I don't only think it is not responsive; I don't think it is correct.

The Court: The objection is overruled.

Q. (By Mr. Lord) Mr. McKusick, I show you Government's Exhibit 33. Can you tell me what that is?

A. It is an affidavit signed by Thomas W. Banks on July 2, 1937.

Mr. Lord: If Your Honor please, I believe it might be helpful if the Court would give this witness permission to read that affidavit to the jury.

The Court: Is it in evidence?

Mr. Lord: Yes, Your Honor.

The Court: He may read it or you may read it.

Mr. Lord: I will read it.

(Whereupon, Mr. Lord read the document referred to as follows:) (Reading)

"STATE OF MINNESOTA)
) ss AFFIDAVIT
COUNTY OF HENNEPIN)

"I, Thomas William Banks, residing at 3817 Drew Avenue South, in the City of Minneapolis, County and State aforesaid, being duly sworn, depose and states as follows:

"That I am 42 years of age and am married, and that my wife's name is Reta Lee Banks. That my wife is not employed.

"That I am employed by the Old Peoria Liquor Company, 301 North Seventh St., Minneapolis. That my salary is $100 a week. That I have been employed by said company for approximately three years."

I might refer to the end of this exhibit to read to you the date. This is dated the 2nd of July, 1937.

(Reading)

"That I also receive $25.00 per week for advertising purposes from the Seagrams Distilling Company, which I spend in entertaining customers.

"That my wife and myself have a safety deposit box in the First National Bank & Trust Company of Minneapolis standing in the name of myself and my wife, Reta Lee Banks.

"That my wife owns the two story house located at 3817 Drew Avenue South, Minneapolis, where we reside. That the total value of house and lot is approximately $11,000. That same is encumbered with mortgage of between $7,000

and $8,000. That I contribute $110 monthly as payments of interest and principal on such mortgage.

"That I give my wife for living expenses each month approximately $250 which included the $110 payment on house mentioned above.

"That my wife owns a cottage located at 3952 Beard Avenue South valued at about $5,000 and mortgaged for about $3,500. That the rent received for such property pays the interest, taxes and principal payments on mortgage, and that I have not contributed anything of value in connection with the acquisition of this property.

"That I own about 105 shares of Cities Service Common stock, which is listed stock and worth about $4.00 per share. That I also own twenty (20) $1,000 Insull Utility Bonds, which have no value. That I also have other stocks in my possession which are worthless and have no value and that a list of such stocks is appended hereto.

"That my wife owns 25% in the stock of Wheel Service Corporation of Minneapolis. That such stock was in my name at one time but was conveyed to her in about 1930. That such stock has cost about $4,500 in cash.

"That my wife also owns one third interest in the stock of Flour City Body Corporation of Minneapolis, which she acquired in about 1930. That I paid about $1,000 of the cost of such stock and my wife $3,000, a total of $4,000.

"That my wife owns and operated in her own name a 1935 Cadillac Sedan, and that is fully paid for.

"That my wife, Reta Lee Banks, has both checking and savings accounts in the First National Bank of Minneapolis.

"That I own two lots located in Ardmore, Oklahoma, which I have never seen. That I have continued to pay the taxes on same, which amount to between $2.00 and $3.00 per year.

"That I took out a $10,000 life insurance policy in the Penn Mutual Life Insurance Company in 1926. That such policy now has a cash surrender value of approximately $2,500 against which I have borrowed $1,500.

"That I also have Government War Risk Insurance, secured by reason of my service in the army, and on which I pay $196 per year as premiums. That I failed to pay the premiums for several years but understand same can still be reinstated.

"That I own Government Bonus bonds in the amount of $200, which I understand are exempt from attachment for Government indebtedness.

"That I have no bank account in my name and no safety deposit box in my name other than the joint safety deposit box mentioned above. That I have no bank account and no safety deposit box in any other name.

"That I owe $2,000 to Harold Banks, Lexington, Nebraska, which I secured by giving my promissory note about January 1, 1934.

"That it is my opinion that I am actually insolvent at the present time. That the most I have ever been worth was $30,000"—

Mr. Hoffmann: If the Court please, we object to counsel pretending to give import to certain words by inflection of his voice.

The Court: (To Mr. Lord) Oh, just read it, counsel.

Mr. Lord: (Continuing reading) "—about 1920.

"That this affidavit is made for the purpose of disclosing my financial condition, in connection with offer in compromise filed by Peter Valder in July, 1937, to try and settle an assessment of $33,589.92 made in June, 1934."

Q. (By Mr. Lord) Mr. McKusick, again showing you Government's Exhibit 33, did you and Mr. Kleven in the course of your examination have occasion to refer to that exhibit?

A. We did.

Q. Did you assist Mr. Kleven in making any computations based upon that exhibit?

A. I did.

Q. Which of you two made the final computations?

A. Gerald O. Kleven.

Q. Now, Mr. McKusick, will you tell me what part in your net worth analysis was played by that exhibit and the computations which Mr. Kleven made based upon that exhibit?

A. After my determination that all other methods of computing the income tax liability of Thomas W. Banks were unsatisfactory, either to the taxpayer or to the Government, and I settled on an application of the net worth system, I recognized that without a beginning net worth, the application of the net worth system would be practically meaningless. I made inquiries of all the Government files that I knew of and found that this Alcohol Tax Liability had been compromised by Thomas W. Banks and others in 1937. I requested George Anderson of the Miscellaneous Tax Unit that he obtain from the Department of Justice files any information he could concerning the compromise settlement of beverage taxes. At that time Mr. Anderson obtained from the Department of Justice, called me, and delivered the record of the compromise settlement to me.

Q. And was that affidavit a part of that file?

A. It was.

Q. Well now, will you tell me in your analysis and computation what part that affidavit played?

A. By virtue of this affidavit, we established that the taxpayer's net worth as of July 2, 1937 and December 31, 1936 was a certain figure.

Q. Now, you don't purport to have that figure in mind right now?

A. I do not.

Q. You state Mr. Kleven made the actual computation?

A. He did.

Q. Would you say that was the beginning point then for your net worth analysis

Mr. Graff: Just a moment. That is objected to as leading, suggestive, and calling for a conclusion.

The Court: (To the witness) You may answer.

A. This affidavit was—

The Court: Just answer the question. Repeat the question, please.

Mr. Lord: Would you read the question, Mr. Reporter?

(The question was read.)

A. Yes.

Q. (By Mr. Lord) Now, Mr. McKusick, what date, then, did you attempt to establish as the exact beginning point of that analysis?

A. December 31, 1936.

Q. Now, Mr. McKusick, I believe you stated that you made inquiries about inheritance and gifts which might have come to Mr. Banks during that period?

A. I did.

Q. Now, did you make an inquiry to ascertain whether or not there were any outstanding obligations due Mr. Banks in any substantial amounts as of December 31, 1936?

A. I did.

Q. Did you find any such outstanding obligations?

A. I did not.

Q. Now, you stated that during this inquiry you have had occasion to talk to Mr. Banks and his representatives, did you not?

A. Yes, I did.

Q. Did they ever during that time mention to you any outstanding obligations owed to this man as of December 31, 1936?

Mr. Graff: Just a moment. That is objected to as immaterial.

The Court: (To the witness) You may answer.

A. There was no discussion about his liabilities as of December 31, 1936.

Q. (By Mr. Lord) Did they ever mention any to you?

A. No.

The Court: Mention what?

Mr. Lord: Mention outstanding obligations due this defendant as of December 31, 1936.

The Court: (To the witness) I think your answer was that there was no discussion about outstanding assets.

Q. (By Mr. Lord) Now, perhaps I should clarify my question. If some one owed Mr. Banks money at that time, what would you count it as?

A. Receivables.

Q. And how would that figure in a net worth analysis?

A. It would be an asset.

Q. Did you discuss any such assets with Mr. Banks or his representatives?

Mr. Graff: May I inquire as to when?

Mr. Lord: As of December 31, 1937.

Mr. Hoffmann: We submit that is repetitious for the third time. The witness has answered twice there was no such discussion.

Mr. Landrum: He was talking about liabilities. They didn't talk about assets.

The Court: And then they were talking about 1936 and now it is 1937.

Mr. Landrum: 1936, Your Honor.

Mr. Hoffmann: No, the date is the same, Your Honor What they were calling "black" before, they are now calling it "white", and it pertains to the same thing.

The Court: Now, that statement may be stricken. It should be disregarded by the jury. There is nothing "black" or "white". Perhaps I didn't understand just what the inquiry was. You may read the question, Mr. Reporter.

(The question was read.)

The Court: That is what I thought.

Mr. Lord: I would like to change that, if the Court please, to December 31, 1936.

The Court: That correction may be made. Now, Mr. Graff, do you have an objection?

Mr. Graff: Now, if the Court please, I am reasonably sure that what Mr. Hoffmann was stating, the previous line of questioning was to outstanding obligations due Mr. Banks. Then he talked about receivables, how he would characterize any money owed to Mr. Banks, and I think Mr. McKusick said he would characterize it as a receivable. Now, those two, I submit, Your Honor, are the same things. So the ground has already been covered.

The Court: What is different in this question?

Mr. Lord: Well, Your Honor, I think that accountingwise, if the accountants were to interpret it, there would probably be no difference; but I thought I had left some confusion—

Mr. Landrum: If the Court please, may I arise?

The Court: Yes.

Mr. Landrum: The witness is talking about liabilities and counsel is talking about assets. Now he is trying to

clear it up that it is assets. The witness talked about liabilities.

The Court: You had better get together.

Mr. Landrum: That is what the situation was. (To the reporter) Just read that question back and if this witness will listen to it, we will clear it up.

The Court: (To the reporter) Read the question again, Mr. Reporter.

(The question was reread.)

Mr. Landrum: '36, it has been changed to.

Mr. Hoffmann: Now, if the Court please, it is apparent that that is an asset and not a liability.

The Court: That is what the inquiry is about. (To the witness) You may answer, Mr. McKusick.

A. I might have discussed it with Joseph A. O'Gordon.

Q. (By Mr. Lord) Were any such assets called to your attention?

Mr. Graff: Just a moment. I submit that that question again, Your Honor, is broad and has already been answered that there hasn't been any such discussion. I think the witness has said so.

The Court: (To the witness) What was the answer? I am not sure that I know what it is. I want to hear this answer.

A. Read the question back, please.

(The question was read.)

A. The assets shown on the affidavit speak for themselves.

Mr. Graff: Well, I submit that that answer go out as not being responsive to the question.

The Court: That answer may be stricken. The affidavit is in evidence and shows what is in it.

Restate your question to this witness, counsel. Make it complete enough so he will know what you are asking.

Q. (By Mr. Lord) Now, Mr. McKusick, in your discussion with Mr. Weinstock and Mr. O'Gordon, and in your reading of the affidavit filed by the taxpayer, were any matters called to your attention which showed that Mr. Banks was owed money by others as of December 31, 1936?

Mr. Graff: Now, I submit, Your Honor, that first of all the question is objectionable because it is a compound question. It refers to Mr. Weinstock, Mr. O'Gordon, and it refers to the affidavit. The affidavit, Exhibit 32, is in evidence and I assume speaks for itself.

Now, if there is any conversation that is referred to with Mr. Weinstock or Mr. O'Gordon, I think the time and place of the conversation and who else was present should be established.

The Court: (To the witness) You may answer, Mr. McKusick.

A. I can't recall any discussion of the assets in the affidavit. We just simply used them—

Mr. Landrum: We are not talking about the affidavit.

The Court: Now read the question, Mr. Reporter. The witness will give close attention and undertake to answer it.

(The question was read.)

A. No.

Q. (By Mr. Lord) Now, Mr. McKusick, did you ever have occasion to discuss with Mr. O'Gordon while he was representing this defendant and while he had a power of attorney on file with the Treasury Department authorizing him to represent this defendant—did you ever discuss the living expenses of Thomas W. Banks?

A. I did.

Q. When did that discussion take place?

A. I can't remember offhand, but I have a few notations in my diary if I could refer to them.

Q. You may to refresh your recollection, I assume.

The Court: (To the witness) You just use your memorandum to refresh your recollection and give answers to such questions as may be put to you. Proceed.

Q. (By Mr. Lord) Now, Mr. McKusick, have you referred to some writing to refresh your recollection?

A. That is right.

Q. What writing is that?

A. I made a notation on the date mentioned as to a conference with Attorney Joseph A. O'Gordon.

Q. And in what book did you make such a memorandum?

A. My daily diary.

Q. Now, where did that conversation take place?

A. At 208 Builders Exchange Building, our former office.

Q. And what did you say to Mr. O'Gordon with reference to living expenses?

A. I don't remember verbatim what I said or he said.

Q. Did you reach an agreement and an understanding as to what the reasonable expenditures for living expenses made by Mr. Banks were for various years?

A. We did.

Q. And what was that agreement?

Mr. Graff: Just a moment. We will object to that testimony on the ground and for the reason that it is incompetent, irrelevant, and immaterial. The defendant not having been present, the testimony of this witness with respect to that conversation would be hearsay.

The Court: Who was present when this—

The Witness: (Interposing) Attorney Joseph A. O'Gordon, who had filed a power of attorney with us to act in the taxpayer's stead.

The Court: And you were there, of course?

The Witness: I was there, and revenue agent Kleven was there—three of us.

The Court: Mr. O'Gordon had already filed his power of attorney to represent this defendant?

The Witness: That is right, Your Honor.

Mr. Graff: If the Court please, I have Exhibit 34 here, which constitutes the power of attorney, and it occurs to me that the Court may well wish to examine it as to whether Mr. O'Gordon was authorized to bind the taxpayer in a criminal case in a conversation with Mr. Kusick.

The Court: Well, as I remember it, Mr. O'Gordon testified that there was an agreement reached for $10,000.00 a year in his testimony here the other day.

Mr. Graff: I don't think so, Your Honor.

Mr. Landrum: That was Mr. Weinstock.

The Court: There was such testimony?

Mr. Landrum: Yes, Mr. Weinstock did so testify.

The Court: Let me see the exhibit. Very well, then, I am just mistaken about it being Mr. O'Gordon.

(Document handed to the Court.)

The Court: Is there a question pending? If not, you may proceed.

Mr. Landrum: The question was: What was the agreement?

The Court: (To the witness) Well, of course, you should state what was said by Mr. O'Gordon, and what was said by you, in the language used if you can give it. If you can't give it, state in substance what was said.

A. I had a schedule of living expenses which were correlated as a result of my inquiries into Mr. Banks' expenditures for living expenses, and I exhibited them to Mr. O'Gordon and I stated about what we would expect in the nature of living expenses. There was some discussion and I think it was about a day lost—the next day we arrived at living expenses.

The Court: Well, what was said the next day?

The Witness: Mr. O'Gordon stated that he had referred to his client and 'He will be happy to use the figures' that we had agreed on the previous day.

The Court: You mean the data that you had proposed?

The Witness: That is right.

Q. (By Mr. Lord) Well, subsequent to that time did you have a conversation with Mr. O'Gordon with reference to living expenses?

A. I did.

Q. Now, Mr. McKusick, can you tell us what living expenses you submitted to Mr. O'Gordon on the occasion referred to here?

Mr. Graff: That is objected to as immaterial.

The Court: You may answer.

A. May I refer to my diary to refresh my memory?

The Court: You may.

Mr. Graff: If the Court please, with further reference to the proposed question, may I point out that if any part of the witness' testimony is material, which we have not agreed to, it would only be such agreement as may have been arrived at with Mr. O'Gordon. We submit that the details would not be material as being hearsay and not in the presence of this taxpayer.

The Court: Do you care for anything except the final agreement which you say was reached?

Mr. Lord: That is all we want at this time, Your Honor —what Mr. O'Gordon agreed to in the way of living expenses at the time of the conversation just referred to.

The Court: You mean the last conversation referred to?

Mr. Lord: No, Your Honor, at the time of the agreement. I believe I did refer to another time, but at the time that he agreed with Mr. O'Gordon as to living expenses and Mr. O'Gordon came back and said, "My client will be happy to accept them:" I want now to know what the amount of those living expenses were.

The Court: You may refer to your diary and answer if you can.

A. $6,000.00 per year for the first four years.

Q. (By Mr. Lord) And by that you mean what years, Mr. McKusick?

A. '40 through '43.

Q. 1940 through 1943? A. That is right.

Q. And for the year 1944?

A. $9,000.00 per year for 1944 and 1945.

Q. For the year 1946? A. $15,000.00 per year.

Q. And 1947? A. $15,000.00.

Q. Now, Mr. McKusick, when did you next talk to Mr. O'Gordon?

Mr. Graff: Counsel, if you will pardon me. I think you had asked him when this conference was and he had not answered it yet.

The Court: Fix the time as nearly as you can.

The Witness: February 14, 1951.

Q. (By Mr. Lord) Now, is that the time when Mr. O'Gordon returned to you and said Mr. Banks would be happy to accept those figures?

A. That is right.

Q. Did you have another conversation with Mr. O'Gordon?

A. At the time,—yes.

Q. When? A. I imagine three or four days later.

Q. And what was that conversation?

Mr. Graff: Well, now, just a moment. We will object to it on the ground that it is hearsay and not in the presence of this defendant.

The Court: This conversation is with O'Gordon?

Mr. Lord: Yes, Your Honor, while he had a power of attorney representing this taxpayer as his agent in fact.

The Court: You may answer.

A. I said, "Joe, where is the letter?"

Q. (By Mr. Lord) And what letter do you refer to?

A. A letter from the taxpayer confirming the amounts of the living expenses which we had agreed on.

Q. Had Mr. O'Gordon indicated that he would furnish you such a letter?

A. He did.

Q. And what was his reply to that question?

Mr. Graff: Pardon me, Mr. McKusick. May our same objection run to the entire line of testimony, Your Honor?

The Court: It is understood.

Mr. Graff: Thank you.

A. He stated that he was in the middle between the taxpayer and the taxpayer's accountant, and he directed me to go to Mr. Weinstock and settle the issue of living expenses with him, and that he, O'Gordon, was giving us permission to go to Weinstock, although O'Gordon held the power of attorney.

Q. (By Mr. Lord) And what did you do?

A. I went to Mr. Weinstock.

Q. What took place then?

A. I displayed our calculation of the taxpayer's living expenses to Mr. Weinstock.

Mr. Graff: Now, just a moment. I take it Mr. O'Gordon was not present?

The Witness: No.

Mr. Graff: Neither was Mr. taxpayer?

The Witness: No.

Mr. Graff: Then, we will object to it on the ground that it is hearsay, Your Honor, not in the presence of the defendant.

The Court: What is your answer to that?

Mr. Lord: I propose to establish the date, Your Honor, and then I will be in a better position to—

The Court: (Interposing) Well, proceed.

Q. (By Mr. Lord) And what was the date of this conversation, Mr. McKusick?

A. May I look at my diary?

(Witness checks diary.)

On April 24, 1951.

Q. Mr. McKusick, I show you Government's Exhibit 35. Do you recognize that?

A. I do.

Q. Had you seen that previous to the time you talked to Mr. Weinstock about living expenses?

A. I had.

Mr. Lord: If the Court please, Government's Exhibit 35 is a power of attorney running to Mr. Weinstock, signed by Mr. Banks and dated the 5th of April, 1951. The witness has stated that the conversation took place on the 21st of April, or about fifteen or sixteen days after the power of

attorney was filed. We submit that the admissions, the statements of his attorney in fact, are admissible against this defendant.

Mr. Graff: If the Court please, we object to this question on the ground that this power of attorney did not authorize either Mr. Weinstock or Mr. McKusick to enter into any agreement with respect to living expenses which would be binding upon this taxpayer. We suggest that probably the Court examine the power of attorney to see whether there is anything said in there about any agreements with respect to living expenses.

The Court: Let me see the exhibit, Mr. Clerk.

(Exhibit handed to the Court.)

Mr. Graff: May I add the further ground that regardless of the terms in the power of attorney, there was no authority on the part of Weinstock to make any commitment which would be binding upon the defendant in a criminal case. Certainly he cannot make an extra judicial statement or confession on behalf of the defendant.

The Court: Oh, I think the power of attorney is sufficient.

Q. (By Mr. Lord) What was your conversation with Mr. Weinstock about this agreement?

Mr. Graff: Just a minute. Let the Court enter its ruling.

The Court: I said I thought the power of attorney was sufficient to permit an answer. You may answer.

A. We discussed the schedule which Mr. Kleven and I had itemized in detail,—the light bill—all of the things with relation to living expenses, and displayed them to Mr. Weinstock, and he said it was his theory that a man lived according to his income. We stated we had no argument with that proposition and asked him to be practical about it, and "What would you suggest?" So it was his suggestion, —we discussed each year in detail,—and it was his sug-

gestion that we use the living expenses which we have now applied.

Q. (By Mr. Lord) And what are those living expenses, Mr. McKusick?

Mr. Graff: May our objection run to the entire line of testimony, Your Honor?

The Court: Yes.

A. I do not have any notation of the living expenses.

Mr. Lord: May I hand this man a paper that might serve to refresh his recollection?

The Court: Yes.

(Document handed to the witness by Mr. Lord.)

Q. (By Mr. Lord) Is the paper which you are examining the schedule which you prepared?

A. It is.

The Court: What sort of a schedule? When was it prepared?

Q. (By Mr. Lord) When was that schedule prepared?

A. This schedule was prepared—I would say February and March, 1951.

Q. What does it—what is it a schedule of?

A. It is a summary of all of the elements that go into living expenses.

Q. Well, now, using that to refresh your recollection, do you recall the figures which you agreed upon with Mr. Weinstock as to this defendant's living expenses for the various years?

A. It was $6,000.00 a year for 1937 to 1941, I believe.

Q. To '41? A. Including '41, inclusive.

Q. All right. And for the year 1942?

A. I think there was a bracket there, like '42 through '45, was $10,000.00 a year, and '46 and '47 were $12,000.00 a year.

Q. Mr. McKusick, state whether or not you have already stated here that you examined for assets and liabilities for all years '37 to '47 inclusive?

Mr. Graff: I think that was the subject of examination this morning, Your Honor.

The Court: You may answer.

A. We were—we looked for both assets and liabilities for each year of the entire period.

Q. Was that from '37 to '47, inclusive?

A. '37 to 47, inclusive.

Q. Mr. McKusick, in the course of your investigation, did you have occasion to examine the books and records of the Blue Goose Resort, Incorporated?

A. I did.

Q. Are those books and records in evidence in this case?

A. They are.

Q. Did you have occasion in conjunction with Mr. Weinstock to make an analysis of certain accounts in those books and records?

Mr. Graff: Just a moment. Objected to as immaterial.

The Court: You may answer.

A. I made the analysis. I only referred to Mr. Weinstock items which the books were not quite clear on.

Q. (By Mr. Lord) Mr. McKusick, did Mr. Weinstock help to clear you up on those items?

Mr. Graff: Just a moment. Objected to as leading, suggestive, calling for a conclusion, and not the best evidence.

The Court: You may answer.

A. He did.

Q. (By Mr. Lord) Mr. McKusick, in order to help clarify the books and records of the Blue Goose Resort, Incorporated, and particularly the records to which you referred, I am going to ask you to step down to the Clerk's table here

and take back to the witness chair with you those books and records which you examined.

A. (Witness complies.)

Q. Now, would you tell us what you examined and tell us what they show?

A. I examined all accounts in the name of Rita L. and/or Thomas W. Banks, as well as any advances from stockholders or advances from others in the general ledger of the corporation.

Q. And are those records contained in Government's Exhibits 152 and 153?

A. They are.

Q. Did you make an analysis of those accounts?

A. I did.

Q. Mr. McKusick, did Mr. Weinstock aid you in the determination of what some of those accounts meant?

Mr. Graff: Just a moment. Objected to as leading, suggestive, calling for a conclusion, not the best evidence, and hearsay.

The Court: You may answer.

A. Those—there was no determination. He explained one or two items.

Q. (By Mr. Lord) Mr. McKusick, were you able, from those books and records, from your investigation, to determine what the investment of Rita Banks and Thomas Banks was in the Blue Goose Resort, Incorporated?

Mr. Graff: Just a moment. May we have an objection, Your Honor, to this question and any others that may follow, objecting to any testimony pertaining to Rita Banks or any others except Tom Banks, on the ground it is irrelevant and immaterial.

The Court: Have the defendant and Rita Banks been making joint tax returns? Did they during the period involved in this case?

Mr. Graff: I think not, Your Honor. I think they are separate returns.

Mr. Lord: If the Court please, I believe in Government's Exhibit 33 the defendant,—that is the question and answers —the defendant has stated that the increase in net worth that is unexplained on the part of Rita Banks is due to moneys received from this defendant and I believe that the record will further show in deeds and income tax returns that numerous properties held by Rita Banks were taken by this defendant when sold for purposes of capital gains, —they were treated as his own, on numerous occasions borne out by the records in evidence in this case.

The Court: Very well.

Mr. Graff: If the Court please, the answer which I think is the answer, which is Exhibit 71, I think—they are also in Exhibit 70—

The Court: Of course, there has been an intermingling of funds and profit of the two parties mentioned.

Read that question, Mr. Reporter.

(The question was read.)

The Witness: I was—

The Court: (Interposing) Just a moment. If you have any further objection, you may make it.

Mr. Graff: I simply want to point out to the Court, Your Honor, that counsel's statement of what is contained in Exhibit 71 does not agree with my understanding of it and I believe his further statement is further not borne out in the conclusion that he reaches from certain real estate transactions. I do not think that his statement is borne out by the record.

The Court: You may answer the question, Mr. McKusick.

Mr. Lord: Will you read the question, Mr. Reporter.

The Court: Well, it simply inquires as to how much each of these parties, the defendant and his wife, had invested in the Blue Goose business.

Q. (By Mr. Lord) Now, I direct your attention particularly to December 31, 1941,—what amount was invested by Thomas and Rita Banks in the Blue Goose Resort, Inc., as shown by your examination, and analysis of the books of that company?

Mr. Graff: Well, now, just a moment. That question has now been changed and the question now—

The Court: Very well, the last question may be stricken. The preceding question may be re-read, Mr. Reporter. (To the witness) Mr. McKusick, you will notice the question and make answer.

(The question was read.)

Q. (By Mr. Lord) And what was that investment?

Mr. Graff: Now, just a moment.

The Court: I think you have your objections in the record.

Mr. Graff: Well, I think, Your Honor, I would like to make one further objection, if I may.

The Court: All right.

Mr. Graff: I think that the exhibits in evidence are the best evidence of it and I would like to have the witness use the exhibits in evidence so that we may identify them as to where he gets his information.

The Court: When you cross-examine this witness, you may have him do so. You may answer the question.

A. My examination disclosed that T. W. Banks had no nominal interest in this corporation, but that Rita L. Banks

was both stockholder and financial banker in that she advanced funds,—loaned funds to the corporation.

Q. (By Mr. Lord) Mr. McKusick, what was the amount of the investment of Rita Banks as of December 31, 1941?

A. She had no investment.

Q. Are you including in your question—in your answer her stock investment,—your answer to that question?

A. I am reading the "advance" account. Are you talking about stock?

Q. Let me revise my question. Now, did you in your computation include the evidence of ownership of stock by Rita Banks contained in Government's Exhibit 150?

A. No.

Q. I am going to ask you the question, based on the ownership of stock and the advances in the way of investments in this company, did you arrive at a conclusion as to the amount invested in the Blue Goose Resort Corporation by Rita Banks and Thomas Banks?

A. I did.

Mr. Graff: Just a moment. I submit, Your Honor, that that question has already been asked and answered, and I object to it on the ground of repetition.

Mr. Landrum: He said he did, Your Honor.

The Court: Yes.—I am not sure that I understand the answer if one has been made. You may answer.

The Witness: I answered it, Your Honor.

Mr. Landrum: What did you say?

The Witness: I did.

Mr. Landrum: Tell the Court what you said, Mr. McKusick.

The Witness: I did.

The Court: Very well.

Q. (By Mr. Lord) Did you arrive at a conclusion as to the investment of December 31, 1941?

A. It was no conclusion—

Mr. Hoffmann: (Interposing) Now, if the Court please, we object to the form of question because it asks for a conclusion and not the facts. The exhibits speak for themselves and his interpretation of them or his conclusion derived from an inspection of the exhibits, we submit invades the province of the jury.

The Court: You may answer.

A. It was no conclusion. Government's Exhibit 150, which is the corporate records, the minutes as well as the stock certificate register, shows that Rita Banks was issued certificate No. 5, calling for 47½ shares in the name of R. L. Banks,—no date—and certificate No. 9, calling for 23¾ shares, issued to R. L. Banks—no date. This shows that the 47½ shares and the 23¾ shares at $100.00 a share indicate that Rita Banks' investment in the stock of the corporation was $7,125.00.

Q. (By Mr. Lord) As of what date?

A. The corporation was organized just prior to, or on or about May 14, 1941. In view of the fact that the stock certificate register is undated, the date of 5/14/41, will have to be used.

The Court: What is that date again?

The Witness: May 14, 1941.

Mr. Graff: I object to that last portion of his statement and ask that it go out as not being responsive and being solely a conclusion of this witness—that portion that May 14th would have to be used.

The Court: The motion is overruled.

Q. (By Mr. Lord) State whether or not those records show that she retained those stocks through 1947.

A. Those certificates show that they are still outstanding, but there was an original certificate No. 1, which I did not read, dated May 14, 1941, calling for 118 shares to "R. L. Banks" which has been voided.

Q. Then the $7,125.00, which you say was invested, is that shown as being still outstanding?

Mr. Graff: Just a moment. I object to that statement as not being a proper statement of this witness' testimony.

The Court: Well, we will find out whether it is proper or not. You may answer.

A. It does.

Q. (By Mr. Lord) Mr. McKusick, I believe I succeeded in confusing you. Will you tell me what you arrived at when you examined the other portion of the books and records of the Blue Goose Resort, Incorporated?

A. It showed no interest in the name of Thomas W. Banks, but it did indicate that Rita L. Banks participated in the account designated "Advances from stockholders and others."

Q. What does that mean, she participated in the account?

A. That means that she and other stockholders, or other individuals, advanced money to the corporation.

Q. And is that aside from the stock record which you just read?

A. It is.

Q. Now, what does that account show with reference to the amount of money advanced by Rita Banks?

Mr. Graff: I wonder if you could identify the book that you are referring to when you are giving us that information,—what exhibit, I mean.

The Court: That is proper.

Q. (By Mr. Lord) Mr. McKusick, I believe we have marked certain pages with those papers. It might help you in finding the exhibits you want to find.

A. Government's Exhibit No. 152-F—

Q. (Interposing) Now, you are going to state all of the various exhibits which you used in this computation, are you not?

A. I am. Mr. Reporter, change that to 152-G—

Mr. Hoffmann: Did he change the exhibit number, Mr Reporter?

The Court: What is the exhibit number?

The Witness: 152-G, Your Honor.

Q. (By Mr. Lord) I believe that it will suffice if you name the exhibit number without reading the entire exhibit, Mr. McKusick. Name the various exhibit numbers which you studied in arriving at your conclusions.

A. 152-G is the first one, 152-F—

The Court: What is it, -F or -G?

The Witness: -F is the second one, Your Honor. I am reading several. My last one was 152-F.

Q. (By Mr. Lord) I suggest that you do not take the papers out. You will have occasion to refer to those exhibits again.

A. 152-E, 152-C, 152-B, and 152-A.

Q. Did you state that you had arrived at a figure which presented the amount advanced to or from Rita Banks to that corporation?

A. I did.

Q. For the year ending 1942, December 31st?

A. I did.

Q. And what was that figure?

A. She owed the corporation $2,420.00.

Q. And did you arrive at a figure respresenting the amount advanced to or from that corporation by Rita Banks for the year ending December 31, 1943?

A. I did.

Q. And what was that amount?

A. The corporation owed Mrs. Banks $10,469.45.

Q. Did you arrive at a figure representing the amount owed to or from that corporation by Rita Banks for the year ending December 31, 1944?

A. I did.

Q. And what was that figure?

A. The corporation owed Rita Banks $16,514.82.

Q. And did you arrive at a figure showing how much was owed to or from that corporation by Rita Banks at the period ending December 31, 1945?

A. I did.

Q. And what was that figure?

A. The corporation owed Rita Banks $9,477.02.

Q. Did you arrive at a figure showing Rita L. Banks' balance in that account as of December 31, 1946?

A. I did.

Q. And what was that figure?

A. $1,488.13.

Q. Was that an asset owed to the company or owed from

A. (Interposing) Rita Banks owed the corporation.

Q. Did you arrive at a figure showing Mrs. Rita Banks' balance in that account as of December 31, 1947?

A. The corporation owed Rita Banks $511.87, on December 31, '47.

Mr. Lord: If the Court please, with reference to Government's Exhibit 221, we offered that in evidence before lunch, and counsel stated that he would like to examine it during the lunch hour and at this time we would like a ruling on that exhibit because the witness proposes to explain from it further.

Mr. Graff: I have, your Honor, examined the exhibit and I have a good deal of cross-examination that I would like to conduct of the witness before I state my objections to it.

The Court: Let me see the exhibit.

Mr. Graff: I am perfectly willing to defer that cross-examination, Your Honor, until the witness is turned over, if that should be more desirable.

The Court: It appears that counsel desires to use it in the examination of the witness. If you have anything pertaining to foundation, I suggest that you inquire at this time. This is not the time for cross-examination.

Mr. Graff: I appreciate that, Your Honor. It goes to the very foundation for the exhibit.

The Court: Very well, you may inquire as to foundation.

Q. (By Mr. Graff.) Mr. McKusick, I hand you Government's Exhibit which has been identified as 211, and I direct your attention to an item here, 10-31-47, $21,000.00. Would you be good enough to show me in what books or records you got that figure from?

A. (Witness leaves stand to secure exhibit from Clerk.)

Mr. Lord: Would it be agreeable to the Court to allow this witness to stand at the table here? He is having an awful time having those books in his lap.

The Court: He may stand wherever it is convenient for him to handle those books and testify.

A. The item of $25,000.00 was obtained from Government's Exhibit 159-A.

Q. (By Mr. Graff.) And will you please point out on Government's Exhibit 159-A where the particular entry is on that 159-A?

A. (Witness indicates.)

Mr. Landrum: Testify orally, Mr. McKusick. You are pointing to it with your finger. Put it in the record.

The Court: What page in the book?

The Witness: It is on Government's Exhibit 159-A, the corporation is page No. 52-1.

The Court: What is that book?

The Witness: It is the general ledger of McCarthy's Cafe, Incorporated. The entry is on September 30, 1947. The led-

ger shows "M. Carey," and there is a pencilled notation beside it that can be either "TD" or the numeral "2. D.", either one.

Q. (By Mr. Graff.) And may I direct your attention to the fact that the entry of $25,000.00 is made in ink on page 159-A, is it not?

A. It is.

Q. And is it not exactly opposite the entry "M. Carey," written in ink?

A. That is right.

Q. And appears to have been written at the same time?

A. That is right.

Q. So that if you were reading this ledger, it shows that M. Carey deposited or paid in $25,000.00 to McCarthy's on the date indicated, which I think is September 30, 1947, and not October 31, 1947, as demonstrated by Exhibit 221? Is not that correct?

A. It would appear that way.

Q. So that Government's Exhibit 159-A shows that one M. Carey had the credit of $25,000.00, and not Thomas Banks as you have put in on Exhibit 221?

Mr. Landrum: If your Honor please, I am just wondering if this is not the regular cross-examination.

The Court: Yes, it is cross-examination.

Mr. Landrum: Rather than as to foundation.

The Court: Is there something else in connection with this exhibit?

Mr. Graff: Yes; I have not heard the answer yet.

The Court: You may answer.

The Witness: What is the question?

The Court: Read it, Mr. Reporter.

(The question was read.)

A. The records do show that credit is due one "M. Carey."

Q. (By Mr. Graff.) And will you please point out to us what records—excuse me, you said to M. Carey?

A. That is right.

Mr. Landrum: Go ahead and finish it Mr. McKusick. You wanted to finish the question, did you not,—or finish the answer.

A. (Continuing.) Investigation disclosed that this—

Mr. Graff: (Interposing.) Well, now, just a moment.

The Court: You may answer.

A. (Continuing.) —That this $25,000.00 represents the proceeds of Mr. Banks' investment in National Plastics, with which Archie M. Carey was associated. Mr. Banks has admitted that he had a half interest in this $25,000.00. Since we made this schedule, we have reduced the $25,000.00 as a credit to another individual whom I have also investigated and who admitted the ownership of the other half.

Mr. Graff: Well, now, just a moment, if the Court please. I move that the last portion of that answer go out as not responsive, as stating conclusions which are not based upon facts, and which are not based upon records in evidence.

The Court: Well, your motion is denied. You probably got something you did not want, but if it can be sustained by the records in this investigation, it is not going to be stricken.

Mr. Graff: Well, if the Court please, I would like to have the witness produce at this time all the records that are necessary to substantiate the voluntary statement that he made.

The Court: If they are available and it is convenient, you may do so. Otherwise, you may assemble those records at another time and present them.

Mr. Landrum: If Your Honor please, the thing that is disturbing me is that Counsel is going into a regular cross-

examination in place of trying to lay a foundation for an objection.

Mr. Graff: If the court please, I am cross-examining him on this exhibit and only that.

The Court: I know you are, and that is the very thing I asked you not to do.

Mr. Graff: Your Honor, how can I—

The Court: (Interposing.) You had a right to ask this witness where he got his information, and he has shown to you the books, or the book that he got it from, and there you should have stopped without entering into a cross-examination.

Mr. Graff: If the Court please, that exhibit does not show that credit to Thomas Banks.

The Court: You disagree with him as to that and he has added some other records.

Mr. Graff: If Your Honor please, the exhibit is in evidence and I submit that it does not so show.

The Court: Is there anything further pertaining to foundation that you want to ask this witness?

Mr. Graff: I do, Your Honor.

The Court: Proceed. Ask him.

Mr. Landrum: As I understand it, counsel has asked the witness to produce the record from which he got that information and he has got it in his hand.

The Court: All right. This is a good time to find out what it shows.

The Witness: This $25,000.00 is the only record of new money in that year. The settlement I made with that other

taxpayer,—he admits that he advanced $12,500.00 to this corporation, and signed a statement to that effect.

The Court: Where did you get that?

The Witness: In the investigation of the other taxpayer, Harry Shepard.

Mr. Graff: Well, now, if the Court please, I submit that anything that—who is this other taxpayer?

The Witness: Harry Shepard is his name.

Mr. Graff: Anything that Harry Shepard may have said is certainly not binding upon this defendant and the statement that he has deduced is hearsay.

The Court: Well, this record contains much data associating this defendant with Harry Shepard. That is my understanding.

Mr. Graff: Your Honor, that may be true, but this defendant is not bound by anything that Harry Shepard has said or anyone else.

The Court: Well, that depends on whether they were partners in some business or not.

Mr. Graff: Well, I readily submit that in certain partnership matters, a person may be somewhat foreclosed by what a partner may have said, but this appears, if I understand Mr. McKusick correctly, is a tax settlement that you made with Mr. Harry Shepard?

The Witness: Harry Shepard was investigated in 1951.

Mr. Graff: Certainly that does not bind Mr. Banks. May I, Your Honor, in order—defer any further cross-examination with respect to this witness as part of the regular cross-examination?

The Court: Now, you wanted to examine this witness as to foundation for this Exhibit 221. I have given you the op-

portunity. Now, if you have anything further to ask pertaining to foundation, you may do so.

Mr. Graff: Thank you, Your Honor. I will so proceed.

Q. (By Mr. Graff.) Mr. McKusick, directing your attention to Government's Exhibit 221,—

The Court: (Interposing.) You may have this chair, Mr. McKusick, unless you desire to examine the—

The Witness: It is a large exhibit, Your Honor. I would sooner stay right down here.

Mr. Graff: It is a little easier for me to point it out if I stand here with him, Your Honor.

The Court: That is satisfactory.

Q. (By Mr. Graff.) Now, directing your attention to certain statements under the heading "Coin-A-Matic", there are listed certain figures. Would you please show me the books from which you got these figures to put on Exhibit 221? Let me direct your attention to the first item of $4,213.15 in the column headed "Coin-A-Matic" under the debit column and for the date 4-30-43?

A. I direct your attention to stockholder's advances, Government's Exhibit 151-I, showing debit April 30th, paid by cash $4,213.15.

Q. Does Government's Exhibit 159-I contain on its face the word "Coin-A-Matic"?

A. No, it does not.

Q. Now, I think if you will take the stand, I will go back here.

(Witness returns to the stand.)

Q. Now, Mr. McKusick, is not it a fact that there are certain figures contained on Government's Exhibit 221 which do not appear on the records which have been introduced into evidence here?

A. No.

Q. May I direct your attention to the question just asked of you with respect to the entry on 4-3-43, to the debit of Coin-A-Matic, $4,213.15. It does not appear on Government's Exhibit 159-I anywhere that Coin-A-Matic advanced that money, does it?

A. Actually—

Q. No, I think you can answer that yes or no. Either it does appear or it does not.

A. No.

Mr. Graff: Now, at this time, if the Court please, we object to the introduction into evidence of Government's Exhibit 221, it appearing by the testimony of this witness that it contains other information not contained in the records which are here in evidence and as to that portion of it, we submit that it is hearsay and there is no privilege of cross-examination with respect to it.

The Court: What is your explanation for this last answer that you gave, if any?

The Witness: Well, Your Honor, do you want the whole story?

The Court: I want the explanation.

The Witness: The Coin-A-Matic Amusement Company was examined concurrently in this period of investigation. It was discovered that a check in the amount of $10,000.00 was charged to the "Suspense" account of Coin-A-Matic Amusement Company, and this $10,000.00 was used to buy a bank money order at the Marquette National Bank. At the same time there was a check drawn on McCarthy's St. Louis Park Cafe for about two or three thousand dollars odd, —I do not recall the figure,—the total amount of thirteen thousand odd was used to buy an off-sale liquor store located at Ely, Minnesota. The liquor was transported to Minneapolis. A part of it was sold by an individual by the name of Henry Sabes. The balance of it was stored in the warehouse

stock of McCarthy's St. Louis Park Cafe, Incorporated. A credit was set up for the current value of this liquor and it was retired by checks payable to these individuals, or anyway, it was extinguished within the year. No part of it was covered in the year-end balance.

Q. (By Mr. Lord.) Now, Mr. McKusick, can you connect that a little bit more directly with the way in which you entered that item?

A. In my analysis of the advances from stockholders and payments to stockholders and other individuals, I had to go across this sheet that showed the record of this liquor transaction, because I took every item in the entire ledger that affected stockholders and others advances, so I had to come across this item of liquor.

Q. Now, what record are you referring to?

A. The general ledger.

Q. Well, is that in McCarthy's, or in the Blue Goose record here?

A. McCarthy's St. Louis Park Cafe.

Q. McCarthy's St. Louis Park Cafe?

A. It is.

Q. How did you then decide to charge the $4,213.15 on Government's Exhibit 159-I under the heading "Coin-A-Matic" on Government's Exhibit for identification 221?

A. Because I was examining all of the records of all of the ventures that this taxpayer was interested in and I kept a mental, if not physical, cross-index, so when I discovered on McCarthy's, or on the Coin-A-Matic records that they had advanced money to McCarthy's Cafe from the endorsements on the backs of checks, then I made a note in the McCarthy's file to look for that money coming into the corporation.

Q. And did you find it?

A. I did.

Q. Where was it? A. "Advances."

Q. Is that the entry that is contained on Government's Exhibit 159-I?

A. This is the repayment of the liquor.

Q. Did you talk to Mr. Weinstock about those entries?

Mr. Hoffmann: Just a moment. If the Court please, I do not understand if that statement of the witness pretended to be an answer to the question of the District Attorney. If it did, I see no responsiveness in it.

Mr. Lord: Would you read the question, Mr. Reporter?

(The second last question and answer were read.)

The Court: What are you referring to when you make that answer?

The Witness: The entries on the left hand side of the ledger, Your Honor.

The Court: Of what ledger?

The Witness: Of the general ledger of McCarthy's Cafe. This bears on 221, this analysis that I made.

The Court: On what page of the ledger do you find that?

The Witness: Government's Exhibit 159-I, the corporation's Ledger Sheet No. 40, under "Stockholder's Advances".

Mr. Graff: May I ask him a question at this point, Your Honor?

The Court: Yes, one question.

Mr. Graff: Thank you.

Q. (By Mr. Graff.) Is not it a fact, Mr. McKusick, that in order for you to make up Government's Exhibit 221, you had to use other documents and other books than the books and documents that have been here introduced before court?

The Witness: In order to get the true record of what should have been entered on the ledger.

Mr. Graff: Well, I think, Your Honor, that rather begs the question. I think that he should admit whether he had to use other books or not.

The Witness: Yes, I did.

Mr. Graff: All right. Well, then, I submit that no proper foundation has been laid for Exhibit 221 because books and records relied upon by this witness are not in evidence.

The Court: Where are those books and records?

Th Witness: We tried to get Harry Shepard to produce them in court and he cannot be found.

The Court: Has he the books and records that you used?

The Witness: He was the partner from whom I obtained the books and records indirectly.

The Court: Do you know where the books and records are?

The Witness: I do not.

The Court: What did you do with them?

The Witness: I returned them to L. L. Peterson, the accountant for Coin-A-Matic Amusement Company.

The Court: You have not seen them since you returned them to him?

The Witness: I have not.

The Court: You do not know where they are ?

The Witness: I do not.

The Court: Is there anything further?

Mr. Lord: No, Your Honor.

The Court: Do you mean you are through with your direct examination of this witness?

Mr. Lord: Well, with reference to foundation only, Your Honor—I had proposed to have the Court rule on that exhibit, if you please, and then I propose to examine him further with

reference to the results, to make it more clear for the record and for the Court and jury.

The Court: That is Exhibit 221?

Mr. Lord: Yes, Your Honor.

The Court: It is received.

Q. (By Mr. Lord.) Now, Mr. McKusick, as a result of your analysis of the books and records of McCarthy's Cafe, were you able to arrive at a figure showing the investment in that company by Thomas or Rita Banks, or both?

A. There was no record of an investment by Thomas Banks in the corporation.

Q. What did it show with reference to an investment?

A. It showed advances made in the name of Rita Banks as well as ownership of stock in the corporation.

Q. Well, now, directing your attention particularly to "Advances", can you tell me what the records showed as be-in the advances of Rita Banks to that corporation?

Mr. Graff: Pardon me a moment, Mr. McKusick. I wonder, Your Honor, if the witness can refer us to the record that he has in mind when he testifies in answer to this question?

The Court: Give the reference, any reference you may have furnishing the facts called for in this question.

A. Exhibit No. 159.

Q. (By Mr. Lord.) Will you name the sub-exhibits which you refer to in making this determination?

A. Exhibit 159-I,—

Q. (Interposing.) Maybe if you started from the front of the book we could keep it in better order, Mr. McKusick.

A. 159-A, -B, -C, -D, -E, -F, -G, -H, and -I, as well as 160.

Mr. Landrum: All right, go ahead, Mr. McKusick, with your answer to the question.

Q. (By Mr. Lord.) Mr. McKusick, will you answer the question which I have propounded—

Mr. Lord: Would you read the question, Mr. Reporter?

(The question was read.)

Mr. Lord: May I amend that question, Your Honor?

The Court: Yes.

Q. (By Mr. Lord.) Will you tell me what figure you arrived at as being the advances by Rita Banks to that corporation?

Mr. Graff: Well, now, I assume from the change in the question that the answer is going to be based not upon the records which are in evidence and for that reason I object to the question as now constituted. If it is from the records that are in evidence, I have no objection.

The Court: The objection is overruled. You may answer.

A. My analysis showed that the balance owing to Rita Banks December 31, 1942, was $7,364.14.

Q. (By Mr. Lord.) Did you state that that was her investment?

A. In 1943 her "Advance" account in the amount of $11,864.14 was cleared out to the investment account. It showed that the balance on December 31, 1944, was $3,500.00. It showed that the balance December 31, 1946, was $13,500.00.

The Court: You say that was '46?

The Witness: That was '46, Your Honor.

Mr. Hoffmann: So that there may be no confusion in the record, Your Honor, I take it the record may show that when the witness uses the word "it" he is referring to his analysis prepared from the material that he has heretofore described.

The Witness: My analysis showed that on December 31, 1947, Rita Banks' credit for advance account was $38,500.00, but that balance was subsequently corrected and reduced in

the amount of $12,500.00 to show the credit to Rita Banks in the amount of $26,000.00.

Government's Exhibit 160, certificate No. 6, dated May 31, 1944, calls for 80 shares, issued to Rita Banks, showing in the register as "Uncancelled." Certificate No. 10, dated June 1, 1944, calling for 2½ shares in the name of Rita Banks, remains uncancelled. Certificate No. 14, dated May 5, 1950, calls for 27½ shares issued to Rita Banks. Now, in regards to this 1950 issuance—

Mr. Hoffmann: (Interposing.) Your Honor, may the record show when the witness so testifies what he is testifying to or explaining. I now do not understand I am sure the record is not clear whether the witness now pretends to interpret his own analysis for the book itself, marked Exhibit 160.

The Witness: Your Honor, the record is not clear and I can explain it.

Mr. Hoffmann: I want to know what, Your Honor, he is explaining so that the record may demonstrate it.

The Court: All right. You may state wherein the record is not clear and give your explanation of it. Have you finished your statement of the outstanding stock of this company?

The Witness: That is right, Your Honor.

Q. (By Mr. Lord) Mr. McKusick, will you tell me for the various years whether or not you have made an analysis of the amount of money invested in that stock, as shown by the records?

A. I have.

Q. Will you tell me what those amounts are?

Mr. Graff: Just a moment. I will object to any analysis that this witness may have made unless it is based upon the records which are in evidence, and that he then point out exactly what books he is referring to and what entries; and

the further objection that his analysis is a conclusion and is not a statement of fact.

The Court: Well, I understand that this witness is an accountant and has had many years' experience,—has devoted several years to an examination of the books and records now in the court room. Why do we have a witness of that character except to make an explanation for the benefit of the Court and jury? So you may proceed, but let me say this, when you refer to records, give the exhibit number and page, or the number of the entry so that counsel can follow you and so that the testimony given by you may be identified in these records.

The Witness: I understand, Your Honor. Government's Exhibit 159-A bears entry August 31, 1947, designated "R.L.B." in the amount of $10,000.00, a debit to this account which is "Notes payable, individuals." This would indicate that "R.L.B." had withdrawn $10,000.00 from this account.

Government's Exhibit 159-B —

The Court: What are you testifying from now?

The Witness: McCarthy's Cafe general ledger, Your Honor. (Continuing) — carries an entry dated August 31, 1947, where "R.L.B." is credited with $10,000.00. It is the same transaction. In brief, she drew $10,000.00 out of her advance account and placed it in her investment account, but there was no stock issued at that time. For that reason, we left it in the advance account and did not increase the stock account.

The Court: Well, you left it in the account in which you found $38,500.00, which was reduced by $12,500.00?

The Witness: That is right.

The Court: Leaving $26,000.00 in the advance account, do you call it?

The Witness: That is the advance account. Now, if I were to follow this transaction wherein Mrs. Banks made arrangements for the purchase of additional stock, I would transfer that $10,000.00 over to her investment account, but since —

The Court: (Interposing.) That is, the records then would show that she had bought $10,000.00 worth of stock, or stock to the extent of $10,000.00?

The Witness: That is right. But as far as dollars and cents are concerned, it did not matter which account it was in, and since no stock was issued to Mrs. Banks at the time she made the transfer to the investment account, it is more proper to leave it in the advance account than it is to call it an investment.

The Court: Well, I am not a bookkeeper but I wanted to understand the transaction. These lawyers may know all about it, but I do not.

Q. (By Mr. Lord.) Mr. McKusick, now, in your analysis, based upon the things which you have mentioned here, did you arrive at a figure showing Mrs. Banks' investment in that corporation for the various years?

A. I did.

Q. What was her investment in that corporation as of December 31, 1942?

Mr. Graff: May the witness again, Your Honor, when he answers this question, refer us to the exhibits that he uses in making that answer so we can follow him?

The Court: Be very careful to do that, Mr. McKusick.

A. The record showed no investment by Rita Banks in 1942.

Q. (By Mr. Lord.) Have you examined the capital stock register with reference to that matter?

A. I am looking at the capital stock register.

Q. Well, now, help me out, Mr. McKusick. What did you understand? Will you tell me if you found anything—let me finish the question, if you please, counsel.

Mr. Graff: I am sorry, I thought you had finished.

The Court: Go ahead.

Q. (By Mr. Lord.) Will you tell me what you did find showing her equity in McCarthy's St. Louis Park Cafe not represented by advances but by what you charged under investment?

A. I would have to refer to my notes.

Q. Well, will you do that, please, to refresh your recollection?

A. (Witness refers to notes.) My analysis showed —

Mr. Graff: Pardon me, Mr. McKusick. I understood the question to be — what he found in certain records, not what the analysis was.

The Witness: May I quote from Government's 221?

Mr. Graff: I suppose that is not a record of McCarthy's —

The Court: (To the witness.) You may tell what Rita Banks had in stock in this corporation December 31, 1942. That was the question.

A. $7,364.14, but that was in the nature of an advance. The stock was not issued to Rita at that time.

The Court: Well, you mean that the corporation owed her that much money?

The Witness: That is right.

Mr. Graff: Pardon me. May the record show that this figure was apparently produced by the witness out of a personal notebook that was not testified to — he is getting it, Your Honor.

Mr. Landrum: He is getting it. If you will wait just a minute, he will get it for you.

Mr. Graff: I am very patient; I will wait.

Mr. Lord: If the Court please, I believe that I have succeeded again in asking a question that is impossible for the witness to answer and I would like —

The Court: Well, don't apologize. Ask one that he can answer.

Mr. Lord: Yes, sir.

Q. (By Mr. Lord.) Mr. McKusick, what did you find to be the investment in this company of Rita Banks for the period ending December 31, 1942?

Mr. Hoffmann: May the record show whether the question is directed to the witness' knowledge from the books, and, if so, what book, Your Honor, so our cross-examination may be pursued?

The Court: Well, that is the one that he has devoted so much time to a few minutes ago —

The Witness: That is right. My analysis of this corporation's records concerning the investment account of Rita Banks showed that on December 31, 1942, she had a credit balance of $7,364.14.

Q. (By Mr. Lord.) Now, on the next year, December 31, 1943, what balance do you show?

A. The advance account shows a zero balance because the total balance of $11,864.14 was transferred to the investment account from the advance account and stock was issued in that amount to Rita L. Banks. The account remained constant for the period 1943 through 1947 in the amount of $11,864.14.

Q. Well now, Mr. McKusick, have you had occasion to amend the computations which you made on the bottom portion of Government's Exhibit 221?

A. I have explained that.

Q. Have you already explained that?

A. I have.

Q. Mr. McKusick, in order to clear the record, I should like to ask you again with reference to the B. & S. Company. You have stated that you made a computation with respect to that company, with respect to the equity in that company by this taxpayer and his wife, did you not?

A. That is right.

Q. Now, help me if I am repeating myself here — did you state into the record what figures you arrived at as a result of those computations showing the equity in that company of Thomas or Rita Banks?

A. The interest —

Mr. Graff: Pardon me a moment. I assume that you want Exhibits 218 and 219?

The Witness: Whatever the B. & S. Company are.

Mr. Graff: May the witness now refer to those exhibits when he answers this question, as I assume he is going to use them for the answer so that we know where he is going to get them from?

Mr. Landrum: I don't know what the witness is going to use, Your Honor. I assume he will use whatever he deems best to do it with.

The Court: Yes, but he should give the reference so that counsel may be able to follow him.

Q. (By Mr. Lord.) Well now, there are two companies, are there not, — Banks & Shepard and B. & S.?

A. B. & S. Corporation.

Q. B. & S. Corporation? A. That is right.

Q. Now, what exhibits do you hold in your hand?

A. 218, 219, and 220.

Q. And which corporation do they have reference to, Mr. McKusick?

A. They refer to a partnership.

Q. What is the name of that partnership?

A. Banks & Shepard. This is wrong —

Q. Let the record show that the witness withdraws his reference to Exhibit 220 and now refers only to Government's Exhibits 219 and 218.

A. Is there a question?

Q. Is this your note, Mr. McKusick (indicating)?

A. It is.

Q. (Continuing) — in your handwriting. Will that serve to refresh your recollection as to your computations made with respect to this company?

A. It will.

Q. Now, based upon Government's Exhibit 218 and 219, can you tell me what figure you arrived at as being the investment of Thomas or Rita Banks in the Banks & Shepard Company?

Mr. Hoffmann: If the Court please, and for the purpose of the record, may there be noted our general objection to the testimony now sought from the witness concerning Exhibits 218 and 219 on the ground heretofore stated, to-wit, that they do not represent the best evidence?

The Court: I understand that objection. It is overruled.

Q. (By Mr. Lord.) I direct your attention particularly, Mr. McKusick, to December 31, 1941.

A. The balance December 31, '41, as shown on Government's Exhibit 218, page 1 thereof, — a balance of $4,538.87.

Q. Now you have stated —

A. (Continuing.) The balance is in error — either through inadvertence or negligence the bookkeeper failed to enter the profit and loss for the period 1939, 1940, and 1941 until April 30, 1942. In order to arrive at a correct balance, December 31, 1941, it was necessary that I add $140.90 to that balance.

Q. And what was your total result then, Mr. McKusick?

A. $4,679.77.

Q. Based upon those exhibits, were you able to arrive at balances of investments in that company for the year 1942, December 31st thereof?

A. *The balance showing on page 1 of Government's Exhibit 218* shows $6,332.32, which is also an understatement for the same reason as explained previously about 1941. The profit and loss entry for the year was not entered until January 1, — January 1st of the subsequent year in the amount of $464.64. This amount added to the balance showing on Government's Exhibit 218, corrects Rita Bank's investment account to $6,796.96.

Q. As of what date?

A. That is as of 12-31-42. Now, in 12-31-43, there was no change.

Q. What is the figure which you take there as not being changed?

A. $8,677.84.

Q. Is that on Government's Exhibit 219?

A. That is on page 2 of Government's Exhibit 218.

Cross-Examination

By Mr. Graff:

Q. Mr. McKusick, you testified under date of May 21st, in respect to certain matters, and you told us some of your previous experience before being employed by the Bureau of Internal Revenue?

A. That is right.

Q. In connection with your background you advised us that at one time you were employed in the Unjust Enrichment Unit of the Bureau of Internal Revenue in connection with the so-called "Windfall Tax," which was imposed as a result of the invalidation of the programs, the agricultural adjustment programs?

A. That is right.

Q. And this so-called Windfall Tax attempted to recapture some 80 per cent of the amount that processors had in their hands at the time of the invalidation of the Act?

A. That is right.

Q. And your particular part in that investigation or work was in connection with wheat processors?

A. *I believe I testified in pork and wheat.*

Q. Pork processors and millers, — that is, wheat processors?

A. That is right.

Q. You stated in connection with that testimony that you generally end up with a tax, — was that your testimony?

A. That is right, in connection with that type of a tax.

Q. I see. So after your experience with the Bureau of Internal Revenue in connection with the so-called Windfall Tax, you then started your work in the Bureau of Internal Revenue as a Special Agent in the Intelligence Unit?

A. That is right.

Q. Starting your work sometime in March of 1941?

A. March 15, 1941.

Q. Now, in connection with your duties in the Intelligence Unit, you make certain investigations that are not made by so-called revenue agents, is that correct?

A. That is right.

Q. In that particular case isn't it a fact that prior to your assignment of it, there were revenue officers working on it?

A. I think that is right.

Q. Those revenue officers were by the name of Melbostad and McCart working under the direction of Mr. Hanson at Minneapolis?

A. That is right.

Q. When you got into the case, it was necessary for you in order to assume some jurisdiction to get the returns which were then in the hands of Mr. McCart and Mr. Melbostad?

A. That is right; with this exception, the group was directed by former special agent E. J. Barry, who made those decisions.

Q. He was the gentleman from Texas, was he not?

A. That is right.

Q. So following your assignment to these matters, you retrieved, if I quote you correctly, the tax returns which were then in the hands of Mr. McCart and Mr. Melbostad?

A. And others.

Q. Yes. And when was it that you started to work on the case involving the taxpayer Thomas Banks?

A. I believe sometime about April — may I refer to my diary?

Q. Surely.

A. (Witness refers to diary.) On April 2nd.

Q. 1946? A. 1946.

Q. Did you then, after commencing on April 2, 1946, have this matter — and by "this matter," I mean the matter involving the taxpayer Thomas Banks — as a matter that you were investigating as a special agent in the Intelligence Unit?

A. This taxpayer was one individual of a list of about eight or ten that we were investigating.

Q. Yes. And your investigation, then, of this taxpayer started on April 2, 1946 and continued until sometime in late 1951 when you submitted your report?

A. No, I would not say that.

Q. What would you say as to the period of time that you had worked on it after starting work on it on April 2, 1946?

A. I was assigned to the investigation of individuals, including this taxpayer, on April 2, 1946, and during all of the year 1946 and most of the year 1947 we worked collectively with no particular assignment made to any particular special agent.

Q. Well, in the final analysis, or in the final progress of it, you did wind up as the particular agent who did complete the investigation which was started by a group together with other taxpayers on April 2, 1946, correct?

A. I wound up with this taxpayer and several others.

Q. And did you complete your investigation insofar as this taxpayer was concerned sometime in the late fall of 1951?

A. I think it was July or August.

Q. Well, if you have your diary there and you wish to refresh your recollection, I have no objection to your doing it.

A. (Witness refers to diary.) Well, I have a notation here on August 22, 1950, that the investigation was far enough completed so that the taxpayer should be interrogated.

Q. I think on your direct examination you indicated that a meeting had been had with the taxpayer in Mr. Weinstock's office —

A. (Interposing.) This is '50 I am giving you now, and on June 4, 1950 we had an appointment with the taxpayer that if he had an explanation, he had an opportunity to come in and make his explanation.

Q. Yes. Well, did you have any such meeting during 1951?

A. No, the taxpayer never appeared.

Q. You had a meeting at one time in Mr. Weinstock's office?

A. That is right, the one I just explained.

Q. Yes. That was in 1950?

A. No, that was '51.

Q. In '51. And it was after that date that your final report was submitted?

A. That is right.

Q. When you were at Mr. Weinstock's office with Mr. Banks, you told him that you were at the point where you were going to wind up your report and that you did not want to rush him?

A. That is right.

Q. You were going to be gone for a few weeks?

A. Two weeks.

Q. And after that, why, if he wanted to say anything, you would be glad to hear it?

A. That is right.

Q. You told him at that time you were going to the northern part of the state, to Mahnomen, I believe?

A. That is right.

Q. And that was in 1951? A. '51.

Q. That is right. So then you made your, submitted your final report in this matter sometime after that?

A. That is right.

Q. Which would be in the latter part of 1951?

A. No, I do not think it was — if you call August the latter part — it was about August that the report was submitted.

Q. Well, was it August, '51?

A. Yes.

Q. All right. And notwithstanding the submission of your final report in August of '51, if that is the date that is now established, was there further investigatorial work that was done by others in the Bureau of Internal Revenue?

A. I believe within the last month there were some inquiries made.

Q. Yes, and that investigation was conducted by you and other agents of the Intelligence Unit of the Treasury Department, isn't that true?

A. That is right.

Q. And isn't it also true at the same time there was some additional investigation made by revenue officers, — Mr. Kleven, for example?

A. That is right.

Q. Mr. Titus? A. That is right.

Q. And some others. Now, you will remember that when you told us that you had to make some determinations as to how you would proceed in this investigation, — do you recall that testimony, Mr. McKusick?

A. Where I applied different methods, the different approaches to the problem —

Q. (Interposing) Yes. A. I do.

Q. You directed our attention in connection with that testimony to Section 41 of the Internal Revenue Code, did you not?

A. That is right.

Q. Under Section 41 of the Internal Revenue Code, provision is made how net income shall be computed?

A. That is right.

Q. And the provision of law provides that if a method employed by a taxpayer does not reflect income, the computation can be made in accordance with a method as in the opinion of the Commissioner of the Bureau of Internal Revenue would reflect such income, isn't that correct?

A. That is right.

Q. Mr. McKusick, did the Commissioner, — the then Commissioner of the Bureau of Internal Revenue — ever make a determination of how this investigation shall be conducted of this taxpayer, having in mind the provision of Section 41 of the Internal Revenue Code?

Mr. Landrum: That is objected to, if the Court please, as calling for a conclusion of the witness, making a lawyer out of him. It is immaterial. We are in this court room under an indictment by a Grand Jury, whether the former Commissioner of Internal Revenue got us in here or not.

The Court: I think that question is objectionable to this witness. (To the witness.) You are not a lawyer?

The Witness: No, sir.

The Court: The objection is sustained.

Mr. Graff: I would like to refer the Court to the direct examination where he testified to that very fact.

The Court: No. I sustained the objection, counsel.

Mr. Graff: May I just have a moment, please, Your Honor?

The Court: Yes.

Mr. Graff: May I approach the Bench a moment, now, Your Honor, to make an offer?

The Court: Yes.

(The following proceedings were had at the Bench, outside the hearing of the jury:)

The Court: Let me see what you have there.

(Copy of transcript handed to the Court.)

The Court: You may make your record.

Mr. Graff: If the Court please, at this time we make the following offer of proof: We offer to prove by the cross-examination of this witness that this witness had no specific authority from the Commissioner of the Bureau of Internal Revenue, as testified by him in his direct examination, under date of May 21, 1952, such testimony being found on his direct examination at page 118 of the record.

Mr. Landrum: The offer is objected to upon the ground and for the reason, first, it is improper as to form, being general in nature, second, upon the ground and for the reason that the evidence sought to be adduced is absolutely incompetent. We are in court under indictment by a Grand Jury. It is evident that he must have received instructions in his official capacity.

The Court: The objection is sustained.

(Whereupon, the following proceedings were had in open court:)

Q. (By Mr. Graff.) Now, in connection with your direct examination, Mr. McKusick, you testified that you had exhausted certain methods of determining the tax liability, if any, and your testimony was that you first tried the direct income method?

A. That is correct.

Q. Would you be good enough to explain in a little bit more detail for us what you mean by the "direct income" method?

A. The direct income means that a specific item of income is omitted from the taxpayer's return. He may have sold a horse or a cow and not reported the proceeds. He may have worked at some plant and not reported the earnings therefrom.

Q. And was it your testimony, Mr. McKusick, that you found that the so-called direct income method would not work in this case?

A. I believe my answer to that question was that the omitted direct income found was unimportant.

Q. Yes. So that as a result of your examination, you found no important omission of direct income from the taxpayer's returns for the years '45, '46, and '47?

A. You see, direct income is the method — specific items. I found little or no specific items of unreported income.

Q. Yes, I put the word "important" in. That is correct?

A. That is correct.

Q. Then the next method you referred to was the so-called "bank deposit" method?

A. That is right.

Q. And you describe that as the gross deposits method, and you indicated that that method was discarded as being inequitable both to the taxpayer as well as to the United Sates, is that correct?

A. That is correct.

Q. The bank deposits' method is simply a matter of using deposits made in banks by taxpayers?

A. That is correct.

Q. And the next method that you referred to was the so-called receipts and disbursements method, which I think you indicated was a variation of the bank deposits as well as the direct income method?

A. That is correct.

Q. Now, the receipts and disbursements method is, as the name implies, the taking of all disbursements and comparing them with all receipts that a taxpayer may have received, whether those are reflected in bank accounts, or whether they are reflected in other items of direct income which have now found themselves into bank accounts?

A. That is correct.

Q. And I think your testimony was that the so-called receipts and disbursements method, so described, — you also discarded that as being inequitable both to the taxpayer as well as to the government?

A. That is correct.

Q. Then the next method that you told us about was what, — do you remember?

A. Wasn't it the net worth method?

Q. Well, in your testimony you didn't come to the net worth method. Was there any other method referred to other than the ones that we have mentioned?

A. May I refer to my notes?

Q. Surely.

A. (Witness checks notes.) Testimony.

Q. I beg your pardon?

A. Testimony.

Q. And what do you mean by "testimony"?

A. I mean that there were several bars and other places in Minneapolis in which the taxpayer was rumored to have an interest. I interviewed the stockholders of those bars under oath. I obtained no information with reference to the taxpayer. It was inconclusive in that I couldn't tell whether those stockholders were telling the truth or whether Mr. Banks actually had no interest in the bar and the rumor was unfounded. So I discarded the testimony approach to a determination of Mr. Banks' income.

Q. Yes. The so-called "testimony" approach is the approach whereby you run down, shall we say, certain rumors and certain allegations that are made by individuals?

A. "Old wives' tales."

Q. Old wives' tales, all right. Then you proceeded to work this from the standpoint of so-called net worth method?

A. That is right.

Q. And as you explained this morning, Mr. McKusick, in the employment of the so-called net worth method, you have to have an appropriate and an accurate starting point?

A. You are correct.

Q. And it follows, I take it, Mr. McKusick, that in the employment of the so-called net worth method, that if you do not have an accurate and a proper starting point you cannot make a case by the so-called net worth method?

A. That is right.

Q. Now, so that by the net worth method to start off with, with your starting point or your anchor, you must first establish the accuracy of your starting point?

A. Yes, you must.

Q. And in connection with your investigation you conducted an examination of numerous books and records of business places, of banks, and of different kinds of people that are engaged in one business or another?

A. I did.

Q. Now, Mr. McKusick, when you testified the other day, you indicated that at the inception of the investigation you and a number of other agents were assigned to make an investigation because of alleged so-called graft payments made to certain Minneapolis officials?

A. I did.

Q. Now, Mr. McKusick, isn't it a fact that as a result of the investigation which you made, that you found no payments of any kind by the taxpayer Tom Banks to any of the so-called officials in Minneapolis?

A. That is correct.

Q. During the period of the investigation, Mr. McKusick, it is also true, is it not, that you knew that Mr. Weinstock was preparing the tax returns for Mr. Banks and Mr. Wein-

stock was also doing certain accounting work for places like the Blue Goose, McCarthy's, Flour City Body, and other companies?

A. That is right.

Q. And with that knowledge and that information, and you being an investigator out looking for certain facts, it was natural for you that you would then go to see Mr. Weinstock since he may have had certain information or certain books and records which you would like to examine?

A. Generally I would look at who signed the return first.

Q. And I think the returns in evidence here indicate that Mr. Weinstock did sign the returns for the taxpayer?

A. That is right.

Q. I think I will check those to make sure.

(Exhibits 1 to 11, inclusive, handed to Mr. Graff by the Clerk.)

Q. On Government's Exhibit 6, which is the return of Tom Banks for the year 1942, it does not appear on the return who made up the return for him, does it?

A. That is right.

Q. But now handing you Government's Exhibit 7, which is for the year 1943, it appears there that Mr. Weinstock made the return for Mr. Banks?

A. It does.

Q. And the same is true of Government's Exhibit 8, which is the '44 return?

A. It is.

Q. And the same is true for Government's Exhibit 9, which is the '45 return?

A. That is right.

Q. And the same is true of Government's Exhibit 10, which is the '46 return?

A. It is.

Q. And the same is true of the 1947 return, which is Government's Exhibit 11?

A. That is right.

Q. So armed with that information, it was most logical for you to go to see Mr. Weinstock?

A. That is right.

Q. And at Mr. Weinstock's office you found that he also had records pertaining to these other businesses that I have mentioned, like McCarthy's, Flour City, Blue Goose and others?

A. That is not true.

Q. Oh, I am sorry. Did he have any of the records of those companies when you went to see him, Mr. McKusick?

A. We analyzed the individuals' returns and from those returns we ascertained the investments Mr. Banks had. We then requisitioned the income tax returns of those ventures and from those returns ascertained that Mr. Weinstock prepared them. We then went to Mr. Weinstock's office with a list of ventures that we knew that he had from returns filed.

Q. I see. So then also you then knew that Mr. Weinstock had made returns for some of the other companies in which you were interested?

A. That is right.

Q. Now, directing your attention to a meeting which was held in Mr. Stone's office — I think sometime in 1950, possibly late in 1950 — do you know the meeting I have in mind?

A. No. I was in Mr. Stone's office for several meetings late in '50.

Q. Well, the meeting—

A. Who was there and I will look it up?

Q. The meeting I am referring to is where Mr. Meshbesher was present, Mr. O'Gordon, Mr. Stone, yourself, I think Thomas was there, and I think Mr. Masica was there. Do you have the date of that meeting?

A. My diary shows, and I quote, "Conference — Joe O'Gordon, Meshbesher, Thomas, Stone and I on T. W. Banks."

Q. And the date?

A. August 22nd. Do you want the rest of the memorandum?

Q. Yes.

A. "O'Gordon as spokesman stated he would prefer that the questions be submitted in writing."

Q. Now, the meeting in Mr. Stone's office had, of course, been prearranged?

A. That is right.

Q. And Mr. Stone, by way of identification, is Arthur Stone who is the head of the Intelligence Unit in this district?

A. Arthur A. Stone.

Q. And the meeting was held in his office, which is on the tenth floor of the new Post Office Building in St. Paul?

A. That is right.

Q. Now, isn't it a fact, Mr. McKusick, that the purpose of the meeting which was held in Mr. Stone's office on August 22, 1950, was for the purpose of determining and settling, if possible, the civil tax liability, if any, of Thomas W. Banks?

A. That is not true.

Q. That was not your understanding?

A. That is not my understanding.

Q. And isn't it true that at this conference held on August 22, 1950 in Mr. Stone's office, that it was agreed among the conferees that you have named that certain questions would be submitted to Mr. O'Gordon, and I think they decided that you should make up the questions? Isn't that right?

A. That is right.

Q. And, as a matter of fact, you later did make up the questions and under date of December 12, 1950, submitted the questions to Mr. O'Gordon?

A. That is right.

Q. And those questions have been introduced into evidence here as Exhibit 70. They are a copy of the questions

but they have been identified as the questions which you made up?

A. That is right.

Q. And then sometime later — I think sometime in February — Mr. O'Gordon submitted to you certain answers to most of the questions, but not all?

A. That is right.

Q. And I think that is in evidence here as Exhibit 71.

(Government's Exhibit 71 handed to Mr. Graff by the Clerk.)

Q. (Continuing.) And on Government's Exhibit 71, when you received it, you put a note on it that you received it from Mr. O'Gordon on February 1, 1951 and then signed your name?

A. I did.

Q. And Exhibit 70, which I now have, is the copy of the questions which you had submitted to Mr. O'Gordon on December 12, 1950?

A. That is right.

Q. Now, when you made up the questions represented by Government's Exhibit 70, Mr. McKusick, did you have the answers to these questions obtained as a result of your investigation?

A. I wouldn't say I had all of the answers. I had the answers to most of the questions.

Q. I see. So you had the answers to most of the questions when you submitted them, is that right?

A. That is right.

Q. And so it was your idea that since you had the answers that you would nevertheless submit the questions and see what happened to them?

A. That isn't quite true.

Q. Well, since you had the answers to the questions, can you please tell me what good purpose might be served that you saw in submitting these questions that you knew the answers to?

A. Well, I was speaking as an accountant. I had the answers to them but I didn't have that "last grain" that goes between what would satisfy an accountant and what would satisfy an attorney in the presentation for evidence.

Q. So, shall we say, that you felt you had the answers but you didn't have them quite to the last grain that you would have liked to have them?

A. That is correct.

Q. And was it the purpose of the conference held on August 22, 1950 to permit you to try to get this last grain that you wanted?

A. That is right.

Q. I see. So the conference in Mr. Stone's office, according to your interpretation, was set up for you to complete your investigation?

A. Not entirely. There was a disagreement during the conference regarding the reason for the conference. The — if I could explain it —

Mr. Landrum: Go ahead and explain it.

Mr. Graff: Well, counsel, may I suggest that you ask him when he becomes your witness?

Mr. Lord: You have asked the reasons for the conference. Why don't you let him explain it?

The Court: Now, just a moment. We will not have any argument across the table. (To the witness.) You may answer that question further if you desire.

A. It began, I would say, early in July or the latter part of June. I called on an attorney in Minneapolis by the name of Simon Meshbesher — this call was probably the 25th or the 30th call on Simon Meshbesher — regarding Mr. Banks' interest in various ventures in Minneapolis. There was a clash of personalities. Mr. Meshbesher stated that he was getting sick of me coming around continually on this investigation.

The Court: (To the witness.) Be as brief as possible.

A. (Continuing.) And I said that, "You are sick of it? What about me?" — and there was a sharp exchange that isn't relevant, and Mr. Meshbesher ended up by saying that, "Why can't we get together?"

I said, "Any such conference, if you mean to lay your client's cards on the table, — such a conference would have to be in Mr. Stone's office in St. Paul."

Now, the actual meeting was delayed because of the absence of W. H. Thomas, who was in charge of that fraud investigation in Minneapolis, and it didn't occur until the date mentioned there, August 22nd. At the time of the meeting, when we had all been seated and I explained the background and the reason for the conference, Mr. O'Gordon stated that he didn't understand that that was the reason for the conference. Well, I said, "Joe, what is the reason for the conference?"

"Well," he said, "I don't want to get anybody in trouble."

I said, "Wait a minute. Throw it out in the middle of the rug there and we will kick it around, if you have got some different impression." — and he made no statement whatever. That was the conference on August 22nd.

Q. (By Mr. Graff.) Well, is it a safe statement to make that everybody was not in agreement in the conference on August 22, 1950?

A. There was no reason, no fundamental reason, for anyone in the conference not to have an understanding as to the reason for the conference. The innuendo raised, but not proven, had no bearing on the conference whatever.

Q. Anyway, as a result of the conference, it was decided that you would write up certain questions which are now on Exhibit 70?

A. That is right, — I was making the investigation.

Q. Yes. Then on February 1st, Mr. O'Gordon gave you the answers as they are now incorporated on Exhibit 71?

A. That is correct.

Q. Now, when you asked the first question: "How much cash did Mr. Banks have on hand July 2, 1937?" — Mr. O'Gordon in the answer did not answer that question?

A. That is right.

Q. Did you have the answer to that question when you asked it on December 12, 1950?

A. No, I said that there was a little grain that I didn't have.

Q. I see. And was it another grain, so to speak, in the "B" part of question 1, — "How much cash did Rita Lee Banks have on hand July 2, 1937?"

A. That is right.

Q. That was also not answered by Mr. O'Gordon?

A. That is right.

Q. And did you have the information to answer question 1(B) when you submitted the questions on December 12, 1950?

A. That is question 1(B)?

Q. That is the one about Rita Lee Banks.

A. Oh, no, — I still don't have the answer.

Q. I see. Now, Mr. McKusick, I will direct your attention to question No. 20, of Exhibit 70. That question is: "How much cash was in the possession of Thomas W. and/or Rita L. Banks as of December 31, 1947?" — and that question was likewise not answered by Mr. O'Gordon?

A. Yes.

The Court: (To the witness) What is the answer?

The Witness: It was not answered.

Q. (By Mr. Graff) Now, did you have the answer to that question when you submitted the questions on Exhibit 70 to Mr. O'Gordon on December 12, 1950?

A. I had a part of the answer.

Q. But you didn't have all of it?

A. No, — I had all I needed.

Q. I see. Was that part of the answer?

A. No, I had cash on hand December 31, '47.

Q. And you have not so far, if I recall your testimony, proved any amount of cash on hand yet as of December 31, 1947, have you?

A. I have proved a check on hand, which is the same as cash.

Q. I see. That is your understanding of it, in any event. Now, at the time that you were examining these various books and records, such as the books and records of the partnership of Banks & Shepard, and the so-called B. & S. Corporation, did you make photostats of all of those exhibits at that time, or cause them to be made?

A. I can't recall what particular records we photostated at what particular time.

Q. Well, during the period of investigation, did you photostat other records than the ones that have been introduced here this morning, or today, as Exhibits 218, 219 and 220?

A. That is right.

Q. So that you have had in your possession photostat copies of these documents during the period of the investigation?

A. Which documents do you mean? Describe the documents. I mean, my statement is that from time to time during the entire investigation from 1946 through November or December, 1950, I would obtain records and make photostats. I can't say that I had records which were photostated in '50 from 1946.

Q. Yes, I understand. Now, some reference has been made here to the books, or certain records of Music Installations, Inc. Do you have photostats of copies of the records of that corporation?

A. I do not.

Q. You have produced here certain records of Banks & Shepard, a partnership. Do you have other records of Banks & Shepard, a partnership, than exhibits 218, 219, and 220?

A. I believe we have a photostat of Rita Banks' partner, Harry Shepard's investment account in the same partnership.

Q. I see. The so-called Banks & Shepard partnership was Rita Banks and Harry Shepard?

A. That is correct.

Q. It was not Tom Banks?

A. That is right.

Q. And the so-called Banks & Shepard partnership had to do with a certain building on Nicollet Avenue, did it not?

A. It owned and operated the property located at 1316, 18, and 20 — Nicollet Avenue.

Q. And that was the only so-called property in the Banks & Shepard partnership?

A. It was the only asset the partnership had.

Q. There are certain tax returns that are in evidence here of the so-called Banks & Shepard partnership?

A. That is right.

Q. Now, do you have photostatic copies of records of the Coin-A-Matic Amusement Company?

A. I do.

Q. As part of your investigation into this matter, you made an investigation into the situation surrounding the Casablanca Cafe, Inc., is that correct?

A. I did.

Q. And the successor, the Casablanca Cafe, not incorporated —

A. I did.

Q. The successor, Shanghai Cafe?

A. I did not.

Q. You made no investigation of that?

A. I made inquiries and rejected the investigation.

Q. Now, you also, in the course of your investigation, made investigations of the books and records of the Flour City Body Company, did you not?

A. That is correct.

Q. Did you also make certain photostats of records of the Flour City Body Company?

A. That is the same question, isn't it?

Q. Whether you made photostats of it—

A. I don't believe we made photostats of the records of the Flour City Body.

Q. And you also had available to you in connection with your examination the records of the Power Brake & Equipment Company?

A. We did obtain some checks of the Power Brake & Equipment Company and had them photostated.

Q. I see. So it was only checks with respect to the Power Brake & Equipment Company?

A. That is right.

Q. Now, the books and records of the Banks & Shepard were turned over to you by Mr. L. L. Peterson?

A. That is right.

Q. Who was Mr. L. L. Peterson?

A. He was an accountant.

Q. Well, I think you indicated on your examination that he didn't have an office, — that he worked from his home?

A. That is right. He was also known as "Bud" Peterson. Other description than that, I can't give you.

Q. Bud Peterson?

A. Bud Peterson. He is listed in the directory under L. L. Peterson.

Q. And it was the same Mr. Peterson that delivered to you certain records pertaining to the books of Banks, — the B. & S. Corporation?

A. That is right.

Q. Was Mr. Peterson the accountant who kept and made the books for the Banks & Shepard partnership, as well as the B. & S. Corporation?

A. That is right.

Q. And he is the Mr. Peterson who made the tax returns of these — either the partnership or the corporation as the

case may be — and it was from there that the income items, those particular things were picked up in the tax returns of Tom Banks where he received the money, or Rita Banks where she received it?

A. Well, that is quite a question. May I hear it again?

Q. Well, never mind. Were you in court the other day when Mr. Weinstock testified?

A. I was.

Q. And he referred to certain corporations, or partnership returns were made available to him where he could pick up the income that was reflected by those returns, and then he would incorporate that into the individual tax returns of Tom Banks or Rita Banks?

A. That is correct.

Q. Those would be samples or examples of that situation?

A. That is right.

Q. Now, you have indicated to us, Mr. McKusick, what you regarded as being certain conclusions from books and records which have been introduced here in evidence, is that right?

A. There is a play between facts and conclusions there. It was not a conclusion.

Q. Well, let me say that whatever you arrived at, you embodied it on Government's Exhibit 221 insofar as McCarthy's were concerned?

A. That is correct.

Q. Now, in connection with Government's Exhibit 221, I do want to go into with you at some length the source of other entries on this exhibit. Now, on Exhibit 221 is the name of J. J. Keegan. Is there a Keegan in the books of McCarthy's?

A. No, there is a Keegan in the books of the Casanova, — or was at that time. He was the manager, that is, the office man for Casanova Bar & Cafe.

Q. Now, I understood that Exhibit 221 was a statement of the amount of money that was invested by certain people,

according to your analysis, in McCarthy's St. Louis Parl Cafe, Inc.?

Mr. Lord: If the Court please, this exhibit was offered only insofar as it reflected the investments of Thomas Banks and Rita Banks. Now, that is as far as we have offered it here. I believe counsel is inquiring of other matters which concern allocations of investments to other individuals not connected with this case.

Mr. Graff: If the exhibit was so limited, Your Honor, —

The Court: Just go ahead and examine the witness. The objection is overruled.

Q. (By Mr. Graff.) Now, is there an account in McCarthy's under the name of J. J. Keegan?

A. I believe so.

Q. Would you find it for me, please.

A. The sheet which I analyzed is Government's Exhibit 159-F, but I also had access at that time to Leonard H. Weinstock's work papers, which work papers may have corrected the money amount now shown in the amount of $5,000.00 to Theodore Culbertson, 12-14—

Q. Now, in Government's Exhibit 221, right next to the Keegan matter, is a Theo. Culbertson, which is, I think, the one that you referred to when you explained the Keegan thing on Government's Exhibit 159-F?

Mr. Lord: (To the witness.) Take your time now, Mr. McKusick and find the correct page.

The Court: Perhaps the witness can find it between now and 10 o'clock tomorrow morning.

Proceedings had in the foregoing entitled matter before the Honorable Robert C. Bell on May 27, 1952. Appearances are as has been heretofore noted.

Tuesday Morning Session, May 27, 1952, 10:00 o'clock A.M.

(Appearances as heretofore noted.)

Mr. Graff: I think, Your Honor, there was a question pending when we closed last evening.

(The last question was read.)

A. That is not true. I re-examined Government's Exhibit 221 and compared it with the general ledger, which is Government's Exhibit 159. The money which I have credited to J. J. Keegan should have been credited to J. Keefe. Neither Keegan's entry, which is an error, or Keefe's, which is correct, has any effect on the investment of Rita or Thomas W. Banks.

Q. (By Mr. Graff) Is it a fair statement then, Mr. McKusick, that Exhibit 221 is in error when it lists a J. J. Keegan as having made an investment in McCarthy's Cafe?

A. That is correct.

Q. By the way, when did you prepare Government's Exhibit 221?

A. I believe it was the latter part of '49 or the fore part of 1950.

Q. And the condition of the ledger, McCarthy's ledger, Exhibit 159, was in substantially the same condition as it is now?

A. Yes,—you see the corporation is on a fiscal year and I was adjusting to calendar year ending December 31, '47, and the entries had been made sufficient to determine what the balances were at the end of 1947.

Q. The entries that you analyze on Exhibit 221 were the same entries that were on the books when you examined them in 1949?

A. That is correct.

Q. So that is, it is a fair statement to say that you made a mistake in putting Keegan down, J. J. Keegan, on that Exhibit 221?

A. That is right, instead of Keefe.

Q. Yesterday in court, I called your attention to the entry on Exhibit 221. It is the last entry, 10-31-47 of $25,000.00.

A. That is right.

Q. If I understood your testimony correctly yesterday, you said that you have found out in connection with the settlement of the case involving Harry Shepard that that entry was in error and should only be $12,500.00, is that correct?

A. Insofar as Rita Banks is concerned.

Q. The total of $25,000.00 that is now on Exhibit 221,—half of that figure was given credit to this Harry Shepard in your settlement with him, was it not?

A. That is right.

Q. So on Exhibit 221, at least insofar as the $25,000.00 entry to which I have called your attention,—that is incorrect and it should state only $12,500.00?

A. That is correct.

Q. Is Exhibit 221 in your handwriting?

A. It is.

Q. I notice that at the bottom of 221 there were apparently some figures written but they have been erased in part at least. You do not contend, I take it, that they constitute any part of Exhibit 221?

A. No. The exhibit at the time I prepared it had questions—I mean there were circumstances which required that questions be asked and this notation which I made at the bottom of Exhibit 221 deals entirely with the entries made up here under Coin-A-Matic.

Q. I just wanted to make sure that they were not a part of the exhibit.

A. No.

Q. Now, I think it was in answer to a question—I forget who asked it of you—that you said in relation to that $25,000.00 item that—you stated that Harry Shepard had admitted that he had advanced $12,500.00 and that a settlement of Harry Shepard's case was made by you in 1951?

A. That is correct.

Q. In order that all of us may understand what a settlement means, do I understand that term to be as you used it, the arriving at an agreement of an amount of tax which is owed and then the case being closed out on that basis?

Mr. Lord: That is objected to, Your Honor, as being not within the scope of the direct examination and irrelevant to the issues in this case. Harry Shepard's case has nothing to do with this case except insofar as he has claimed certain assets. If counsel proposes to inquire further into that aspect of it, we have no objection, but if we are going to hear every case this agent has had anything to do with, we are going to be here a long time.

The Court: Why is this material?

Mr. Graff: If the Court please, over my objection, this witness went into the settlement with Harry Shepard to support his claim concerning the $25,000.00 check and to support his testimony that the entry on 221 was in error because Harry Shepard told him he had advanced half that money.

The Court: Well, did he say anything more than that a settlement of Shepard's case had been made? I think that is all he said. There is no dispute about that.

Mr. Graff: He said "settlement." I am simply asking what he meant by that term.

The Court: Well, he may explain what he meant by that term, briefly.

A. In 1951 we made a determination of Harry Shepard's income. The amount which we arrived at was agreed by Mr. Shepard and the taxes were paid.

Q. (By Mr. Graff) And that has been the end of the matter?

A. That is correct.

Q. As a part of that settlement, there is a consent of some form that the taxpayer signs and then the taxes are assessed on that basis by the Collector's office?

A. That is correct.

Q. And there is no proceeding of any other kind pending with respect to that matter?

Mr. Landrum: That is objected to, if the Court please. It is objected to for pure prejudice.

The Court: The witness has stated that there was a settlement in 1951.

Mr. Graff: That is right, Your Honor.

The Court: And the taxes paid and it was terminated and there is no use wasting any more time on it.

Mr. Graff: I am not objecting to the ruling of the Court, Your Honor. I am objecting to the objection that counsel made about prejudice.

The Court: Well, the record has been made. We will proceed with something else.

Q. (By Mr. Graff) In connection with the so-called net worth approach that you made, you testified somewhat yesterday regarding assets and liabilities, is that correct, Mr. McKusick?

A. That is correct.

Q. And if I understood your testimony correctly, you testified that as far as you were concerned, you did not find any so-called accounts receivable?

A. That is incorrect.

Q. Did you testify that there were certain funds which were owing to the taxpayer?

A. The testimony, I believe, had to do with an abstract net worth case.

Q. Well, let me ask you this question, Mr. McKusick: As a part of your investigation, did you find that there were

certain moneys which were due and owing to the taxpayer as of the beginning point of your net worth computations?

A. We did not.

Q. Mr. McKusick, isn't it a fact that if there were obligations due and owing the taxpayer as of the beginning of the net worth period, your net worth beginning point would be off to that extent?

A. In the abstract, that would be correct.

Q. Yes. In other words, if you said that at the beginning point of the net worth case nobody owed him any money and, as a matter of fact, somebody owed him, shall we say, a thousand dollars, and you did not have that in there,—then your beginning point would be off to the extent of $1,000.00, isn't that correct?

A. In that respect all I can say is that we made a diligent search.

Q. Well, I mean, just answer my question.

A. That would be right, in the abstract.

Q. Yes, that is right. Now, isn't it also true, Mr. McKusick, that in your so-called beginning of your net worth that you arrived at a certain amount of cash that the taxpayer had as of the beginning net worth period?

A. We asked the taxpayer—

Q. Now, wait a minute. Didn't you—you have made your computations, now?

A. That is right.

Q. You have arrived at a certain amount of tax, have you not?

A. At the end of the period.

Q. You arrived at no amount of cash as of the beginning of the net worth period?

A. That is correct.

Q. I see. Mr. McKusick, isn't it true that if the taxpayer, as a matter of fact, had a certain amount of cash as of the beginning of the net worth period, your net worth starting point would be off to the extent of that cash?

A. We simply went by the taxpayer's affidavit.

Q. I think you can answer that yes or no.

A. If he did have it would be—

Q. (Interposing) Yes, assume that he did have.

A. That is an abstract question.

Q. That is right. For example, if you started out with your net worth at your beginning point and you had $100.00 in cash and actually the taxpayer had a thousand dollars in cash, your beginning net worth would be off to the extent of $900.00, would it not?

A. That is correct.

Q. Surely. Now, you indicated that your investigation started as of April 2, 1946?

A. I indicated that the group investigation started April 2, 1946.

Q. Yes, I meant the group, and more intensive activity on your part was later?

A. The latter part of '47.

Q. Yes. So shall we say that your investigation of this taxpayer was more concentrated in the latter part of 1947?

A. That is right.

Q. Now, as a part of your investigation, which became more intensive the latter part of 1947, it was necessary for you to find in your beginning net worth what the picture was as of the beginning of that net worth?

A. That is right.

Q. So if you started the latter part of 1947 and your beginning net worth was December 31, 1936, it would be necessary for you to go back eleven years approximately?

A. That is right.

Q. So that any investigation that you conducted as of the latter part of '47 had to try to ascertain the facts as they existed some eleven years ago?

A. On a diminishing basis, eleven, ten, nine, eight,—

Q. Yes,—shall we put it the other way,—as far as the '45 return?

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A. That is right.

Q. It had to be two years less?

A. That is right.

Q. And as far as the '46 return, one year less?

A. That is right.

Q. And as far as the '47 return, it had to be eleven years less?

A. That is right.

Q. Isn't it true though, that you were making it in 1947?

A. Not entirely.

Q. What do you mean?

A. May I explain?

Q. Surely.

A. In 1947 I had the benefit of a previous examination through the years '33 or '34, which was settled in 1937. I used the results of that investigation, which was agreed to by the taxpayers. I adjusted to the affidavit that he filed in 1937. There was very little differential. Each proved the other. The affidavit in effect proved the result of the tax investigation which was agreed to. The results of the tax investigation corroborated the affidavit.

Q. Then as a matter of fact, you had and did go back more than eleven years,—you went back more years than that?

A. I went back to a stipulation of tax settlement in 1937.

Q. Yes. Well—

A. (Interposing.) I did not go back to 1920 or '21 and '22, when the prior investigators made their investigation. I just used the results of their investigation.

Q. I see. So then actually you went back eleven years?

A. Yes.

Q. Regardless of what you may have used, you had to go back eleven years?

A. For some items. Some items ten, some nine, and some eight.

Q. Which items eight?

A. Well, I mean—

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Q. Which items eight years ?

A. The idea as—

Q. (Interposing.) Just tell me what years?

A. You subtract the years. You see, I went back eleven years for the investigation.

Q. Yes, and you tell me for which return did you only go back eight years? It had to be nine, ten or eleven, didn't it?

A. That is right.

Q. Not eight?

A. All right.

Q. That is right. Now, so that when you started out in the latter part of 1947, you had on the average to go back to try to find out what certain facts were as of December 31, 1936?

A. What certain facts were, that is right.

Q. Yes. And as a part of your investigation, you got into this so-called Casablanca affair, did you not?

A. I did.

Q. And you found as a result of your investigation, did you not, that Tom Banks was the owner of, I think, 90 shares of stock of a total of 180 shares?

A. I believe the record will speak for itself.

Mr. Graff: Well, may I have Exhibits 70 and 71, please?

Q. When you say the record, you mean these exhibits?

A. That is right.

(Exhibits handed to Mr. Graff by the Clerk.)

Q. Mr. McKusick, I am reading from Government's Exhibit 70, and I am reading from question 18. Preceding question 18 you have a number of statements which preface the question, is that not correct?

A. That is correct.

Q. So I will read the preface first before I read the question. Now, these questions and these prefaces were all your preparation? I mean you prepared them?

A. That is right.

Q. They decided that at that conference —

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A. (Interposing.) They decided that the questions would be in writing but it went without saying that I would prepare the questions since I was making the investigation.

Q. They also decided that you would have to do the work of preparing them?

A. There was no decision like that. It was just natural. It was inferred. I was making the investigation. They just decided that the questions would be submitted in writing instead of a personal appearance of the taxpayer.

Q. I see. Well, then, shall we say you dictated—

A. (Interposing.) When the decision was made, I formulated the questions, propounded them.

Q. All right. "This investigation disclosed that on June 30, 1945, the capital stock outstanding in Casablanca, Inc. was held as follows: Thomas T. Gleason, 56 shares; F. J. Wickers, 90 shares; Herman Mitch, 34 shares. Total, 180 shares. On August 8, 1945, Mr. William Donnelly deposited $20,000.00 in currency to his account with the First Produce State Bank, and on the same day tendered his certified check, presumably for the purchase of the Casablanca. He operated it for a time, sold all but inventory to some Chinamen operating as Toung-Poy, who subsequently sold it to A. B. Percansky for $42,500.00. From the sale of the property to Toung-Poy and from the sale of the inventory to others, Mr. Donnelly realized approximately $43,000.00, a portion of which was retained by him and the balance presumably used to retire obligations of the corporation which were assumed at the time he made his original investment, i. e., notes payable individuals in the amount of $31,000.00 as of December 31, 1945."

Now, is when the figure 18 comes and the first question pertaining to that, and this is the question—

A. (Interposing.) There were several sub-numbers.

Q. Yes. That is the first one I am reading now, question 18: "Did Mr. Banks have any interest in the stock of the corporation shown above nominally held in the names of

Thomas P. Gleason, F. J. Wickers and Herman Mitch? Specify the nominee and give date and amount of investment.

"Answer: Owned stock in name of Wickers."

So that the question and answer indicated that Mr. Banks was the owner of 90 shares of Casablanca, Inc., is that right?

A. That is right.

The Court: What was the answer?

The Witness: That is correct, Your Honor.

Q. (By Mr. Graff.) Now, isn't it a fact that the so-called cashier's checks represented by the group of exhibits which have been identified as Exhibit 117—they have different numbers but they are all 117—that went to Leonard Weinstock, represented at least a partial payment for the interest that the stockholders of the Casablanca had in those assets?

A. On a prorata basis.

Q. Yes. So that those checks in the 117 group, at least in part, represented a return of principal—

A. (Interposing.) To all the stockholders.

Q. Yes. So that on that basis, Thomas Banks, of that amount, would be entitled to receive 50 per cent, Gleason would be entitled to receive 56/180ths, and Herman Mitch would be entitled to receive 34/180ths.

A. After the liability which was assumed by Mr. Donnelly was retired.

Q. Yes. And the only liabilities that Mr. Donnelly assumed, if any, were the obligations which secured the loans on the liquor which was in the warehouse?

A. And the matter of $31,000.00 which was loaned to the Casablanca Corporation between the dates, August 8, 1945, and December 17, 1945.

Q. Well, by whom—

A. (Interposing.) And before the stockholders received anything there should be some settlement with this other liability.

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Q. Well, for our purposes here, the cashier's checks in the 117 group represented prorata partial return on investment to Tom Banks, is that right?

A. You cannot say that without recognizing the payments on that $31,000.00. That was assumed by Donnelly who followed the corporation. He took it in his investment account.

Q. Mr. McKusick, did you find out as part of your investigation that the stock in the Casablanca was issued in the year of '40 or '41?

A. I do not recall the exact date.

Q. Well, was it around that time?

A. It cannot be around two different dates so far apart.

Q. Well—

A. (Interposing.) I would say off-hand it was closer to '42.

Q. I see. Your best recollection is it was sometime in '42?

A. Yes.

Q. Now, when you asked that question No. 18,—I have not read all of it. I only read part of it,—did you know the answers to that question when you asked it?

A. No.

Q. This was one of those grains that you still did not have?

A. That is right.

Q. And with respect to the $20,000.00 that Mr. Donnelly had when he purchased the Casablanca, you also asked whether Mr. Banks had any interest in that $20,000.00, did you not?

A. I did.

Q. And the answer was that Mr. Banks had no interest?

A. That is what he answered.

Q. Yes. Did you have the answer to that question also when you asked it?

A. No.

Q. That was a grain also that you were missing?

A. That is right.

Q. You asked the question: "Did Mr. Banks receive funds from L. H. Weinstock as Trustee for William Donnelly in the liquidation of his Casablanca Cafe venture?

"Answer: Yes."

Did you also know the answer to that question when you asked it?

A. I had a part of the answer.

Q. I see. What part did you have?

A. A check that went to the Daily Mail.

Q. And did you talk to Mr. Welsh about that check?

A. No, I tried to locate Mr. Welsh and I could not locate him.

Q. I see. So your investigation for the period during the entire time failed to locate Mr. Welsh, is that correct?

A. That is correct.

Mr. Graff: May I have Exhibit 215, please?

(The exhibit was handed to Mr. Graff.)

Q. So I understand that despite your investigative efforts, you were unable to locate Mr. Welsh?

A. That is right.

Q. As a part of your investigation, didn't you ascertain the fact that he had been and probably was a newspaper man?

A. That is right.

Q. Formerly associated with the Minneapolis Tribune and the Minneapolis Star?

A. That is right.

Q. And that he had gone directly from this Minneapolis Tribune and Star to this so-called venture, the Daily Mail?

A. That is right.

Q. And associated with him in that venture of the Daily Mail were two other persons, were there not?

A. I was not interested in anyone else but Welsh. I do not know how many other people were in it.

Q. I see. Well, now, the Daily Mail was a newspaper which was proposed to be published in the Twin Cities, was it not?

A. That is right.

Q. And when you found the check which was payable to Len Welsh, did that investigation lead you to the Daily Mail?

A. To the discovery that the Daily Mail was out of business.

Q. Mr. McKusick, you can probably help me a little bit,—I hand you Government's Exhibit 215 which has been identified as a check to Len Welsh, and I will ask you whether there is anything on that exhibit which brings or mentions the Daily Mail?

A. There is nothing that mentions the Daily Mail.

Q. Well, was it an assumption on your part that the check represented by Government's Exhibit 215 was to be used for the Daily Mail?

A. That is right. For our purposes, as an advance by Mr. Banks, it was immaterial whether it went to the Daily Mail or Welsh.

Q. Mr. McKusick—

A. (Interposing.) We have Welsh and the Daily Mail mentioned.

Q. I see. Now, Mr. McKusick, in the course of your investigation of this matter, how many checks did you find payable to Mr. Welsh by Mr. Weinstock as Trustee?

A. I believe there were two.

Q. And so far the Government has only introduced in evidence Exhibit 215, is that right?

A. I have not kept track of what has been introduced in evidence.

Q. Well, you can take my word for it that this is the only check so far that has been introduced.

A. If you say it is, all right.

Q. And from your investigation are you able to tell us whether the funds represented by Government's Exhibit

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215 came from funds in the hands of Leonard Weinstock as Trustee for Mr. Donnelly?

A. I could answer that question if I could look at my memorandums.

Mr. Landrum: Look at them.

(Witness leaves stand to secure records.)

A. (Continuing.) There is no proof that this money came from William Donnelly.

Q. (By Mr. Graff.) I think my question was whether there was anything on Government's Exhibit 215 from which you could conclusively establish the fact that the proceeds of that check came from funds in the hands of Leonard Weinstock as Trustee under that power of attorney which was given to him by Mr. Donnelly? There isn't, I take it?

A. There isn't.

Q. And as a part of your investigation, did you determine whether Mr. Welsh or the Daily Mail, or both of them, repaid any portion of the funds represented by Government's Exhibit 215?

A. I do not believe there were any repayments at the time I looked at the Daily Mail ledger.

Q. I see. Now, you did not contact Mr. Welsh, however—I mean, you could not find him?

A. No, I could not find him.

Q. So that you do not know, as far as Mr. Welsh is concerned, whether he received these funds, and whether he paid them back, or what he did with them?

A. I had evidence to form a fair conclusion.

Q. I see, but you did not get the answer from Mr. Welsh?

A. That is right. I made enough investigation to determine that Mr. Welsh was without funds when he left town.

Q. I see. When he left town,—you found that he left town?

A. He had left town prior to the time I began to make inquiries here.

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Q. And had he left town by the end of 1947?

A. No. The Mail was operating, I believe, in '47.

Q. Yes, so he was available at that time?

A. I did not make the inquiry on Len Welsh in '47.

Q. I see. But when you found out about Len Welsh, you could not find him?

A. When I got around to make the inquiry concerning the Trustee account on Casablanca, Len Welsh and others, the Daily Mail was defunct and Mr. Len Welsh had left town.

Q. You made no investigation of Len Welsh to determine whether he—

Mr. Lord: (Interposing.) That is objected to as being repetitious, Your Honor. The witness has, I think, thoroughly explained what investigation he made with reference to Len Welsh.

The Court: Finish your question.

Mr. Graff: I wonder, Mr. Reporter, would you be good enough to read as far as I got.

(The question was read.)

Q. (By Mr. Graff.) (Continuing.) —made any repayments during the year 1947 of the proceeds of the check represented by Government's Exhibit 215?

The Court: You may answer that question.

A. I never had any contact with Mr. Welsh.

Q. (By Mr. Graff.) So the answer to my question is no?

The Court: No, that is not the answer to that question. As far as that answer goes, it states that the witness had no communication with Welsh.

Mr. Graff: Well, may I ask the witness then, again, whether he made any investigation from Len Welsh to ascer-

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tain whether he had repaid any portion of the proceeds represented by Government's Exhibit 215?

The Court: Well, now, the witness has said that he made no investigation of Len Welsh. That much ought to be settled.

Mr. Graff: Yes.

The Court: Now, if you want to know if he made other investigation as to whether or not this check was repaid, you may make that inquiry.

Mr. Graff: All right.

The Court: That is proper.

Mr. Graff: Will you strike out my question and let me ask this question:

Q. (By Mr. Graff.) In your investigation did you find whether any portion of the check represented by Government's Exhibit 215 was repaid during the calendar year 1947?

A. In my inquiries there was no repayment,—no money running from Len Welsh to Mr. Banks.

Q. So that you found no evidence of repayment?

A. That is right.

Q. Directing your attention further to Government's Exhibit 70, the following question is asked in question No. 17:—there is a slight preface to the question, which I will read, but let me show it to you before I read it.

(Document shown to the witness.)

A. Yes.

Q. (By Mr. Graff.) "On November 29, 1944, Mr. Hollen purchased an SR-6 Stinson Plane in Oil City, Pennsylvania, for $5,000.00. In an affidavit dated July 12, 1949, Mr. William Volding, pilot, stated that the plane operated by Metropolitan Airways was used to transport roses from California to Minnesota."

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Question 17: "Did Mr. Banks have any interest in the above-described plane or floral business? State dates and amounts of investment."

"Answer: No interest or knowledge."

Now, did you know the answer to that question before you asked it?

A. I did not.

Q. And so that you did not know the answer to that question at all, is that right?

A. That is right.

Q. And these questions, if I recall correctly, were submitted on December 12, 1950, is that right?

A. I believe that is the correct date.

Q. And you had been investigating the matter in some shape or other ever since April 2, 1946,—having in mind that the original phase of the investigation was this so-called group investigation, and your investigation became more intensive the latter part of 1947?

A. That is right.

Q. So after that preliminary investigation from April 2, 1946 to the latter part of 1947, and then your intensive investigation from the latter part of 1946 until December 12, 1951, you did not know the answer to this question that I just read?

A. I had a lot of information about the answer to the question.

Q. Well, I think you have testified that you did not know the answer to the question.

A. That is right, I did not have that much of it.

Q. I see. Despite your investigative efforts over the periods of time that I have indicated?

A. That is right.

Q. You knew as a result of your investigation that Herman Mitch was one of the stockholders of Casablanca, Inc.? I think I may have asked that question. Did I ask you before?

A. I do not recall.

Q. I see. Well, let me ask it now to make sure. You found that from your investigation?

A. I found that Herman Mitch was nominee from some shares of stock in the corporation.

Q. And he was not active in the operation of it?

A. He was listed as manager.

Q. Yes, and did you find in your investigation that Mr. Mitch had negotiated the lease for the premises on the place that was operated as the Casablanca?

A. That may have been.

Q. I mean, didn't you so find from your investigation?

A. I thought the Casablanca was a corporation.

Q. Yes. My question is this: Did not you find from your investigation that Mr. Mitch negotiated the lease for the building in which the Casablanca was operated?

A. I cannot recall that I did.

Q. You cannot recall that. Didn't you find as a result of your investigation, Mr. McKusick, that prior to the opening of the Casablanca that Herman Mitch was indebted to Tom Banks?

A. No, not at all during the entire investigation.

Q. Didn't you have some conversations with Leonard Weinstock in which he advised you of that fact and indicated that a portion of the payments in the so-called 117 group went as part of repayments of previous indebtedness of Herman Mitch to Tom Banks?

A. That first came up when Mr. Weinstock appeared before the U. S. Attorney and the case was in progress. It happened not more than two or three weeks ago. Mr. Weinstock told me that Mr. Mitch had repaid $19,000.00 into this account. All during the period of the investigation there was no disclosure made from any source whatsoever.

Q. In any event—

Mr. Landrum: (Interposing.) Just a moment, if the Court please.

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Mr. Graff: Well, just a moment.

Mr. Landrum: I want to get that date definitely when Mr. Weinstock told him that.

The Court: You may give the date, if you can.

The Witness: I do not have the precise date, Your Honor, at the time Mr. Weinstock presented the cancelled checks of the Weinstock Trustee account which is at the Lincoln Bank,—at the time he brought them in to Revenue Agent Kleven and I, he explained then that there was $19,000.00 that Mitch had repaid.

The Court: That was about three weeks ago?

The Witness: No more than three weeks ago, Your Honor.

The Court: Proceed, Mr. Graff.

Q. (By Mr. Graff.) In Government's Exhibit 70, consisting of the questions, was this question—the question No. 9, and there is a statement or a preface preceding the actual question—"Mr. and Mrs. Banks are the lessees to Lots 5 and 6 of the Hungry Jack Summer Group in the Superior National Forest. This investigation disclosed that the main lodge was erected in about 1930 and acquired by the taxpayer subsequent thereto, and that a boat house and a garage-care-taker building, were erected and sundry ground improvements made by the taxpayer."

9, Question: "State date and amount of original investment in this property and date of construction and cost of garage-caretaker building (1930), boat house (1939); and date and cost of grading and development of grounds, docks, walks, and entrance driveway."

"Answer: Original investment about $1,000.00; garage $2,000.00; boat house, $200.00; labor, $400.00; plus labor of T. Banks. Road graded at no cost."

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Q. Now, did you have the answers to that question when you submitted the original questions to Mr. O'Gordon on or about December 12, 1950?

A. We had what we could have used in lieu of an answer. We had the benefit of an inquiry of the forestry office. We had the tax,—copies of the tax bills. We did not have an estimation on the value of the labor of T. Banks.

Q. Now, didn't you find as a part of your investigation, Mr. McKusick, that Lots 5 and 6, referred to in your question No. 10, are the property of the United States?

A. That is correct.

Q. And that Tom Banks leased Lots 5 and 6 from the United States—

A. (Interposing.) I do not believe that is correct. I think Rita Banks.

Q. Rita Banks leased it?

A. I think Rita Banks leased those.

Q. In other words, it is a lease from the United States?

A. That is right.

Q. It is an arrangement under which you can lease land from the Government and you can put a building on it and is a situation that is not at all uncommon in the northern part of the state?

A. That is right.

Q. Now, did you in connection with your investigation investigate or examine the tax returns of a novelty company, —the Northwest Novelty Company?

A. I do not recall. There were ventures which Mr. Banks was rumored to have an interest in that we made an investigation of and it would be dropped if it could not be proven that Mr. Banks did have an interest in it. Now the Northwestern Novelty might come under that category.

Q. I see. Well, do you recall, Mr. McKusick, whether you made any investigation or examination of the tax return for 1946 of the Northwest Novelty Company?

A. No, I did not make that examination. I might have made an inquiry of it.

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Q. Mr. McKusick, I direct your attention to Government's Exhibit 10, which has been identified as the 1946 tax return of Tom Banks, and on the first typewritten sheet under partnership, isn't there an item "Northwestern Novelty Company, Minneapolis", where income is reported, $1,312.50?

A. That is right.

Q. Well, now, didn't you, as a part of your investigation, then, go to the return of the Northwestern Novelty Company to see whether they had paid that amount to Tom Banks, or any amount to ascertain the correctness of the return filed by Tom Banks?

A. The revenue agent may have.

Q. You did not do it?

A. I do not recall that I did.

Q. Well, did I understand originally that when you got into this case under date of April 2, 1946, that one of the first steps that you did was to use your language "Retrieve the returns from the revenue agent," and then examined all the sources of income disclosed by the return?

A. They were surveyed for that purpose.

Q. So do I understand you now that you did or you did not examine the return of the Northwestern Novelty Company for the year 1946?

A. Are you talking about examining the return as a revenue agent examines a return or are you talking about looking at the return?

Q. I am talking about your investigation. Did you examine the return and make some examination of the return of the Northwestern Novelty Company for the calendar year 1946 or the fiscal year, which would encompass this payment, if they were on a fiscal year basis?

A. Yes, we looked at the return, I did, and we got what books that were available.

Q. I see.

A. I do not recall that the books were too important so—

Q. And may I ask you, Mr. McKusick, as a result of your

investigation, what did you find out about that item reported in Government's Exhibit 10 from the Northwestern Novelty Company in the sum of $1312.50?

A. It is possible that it was accurate to the penny with the partnership return of the Northwest Novelty Company.

Q. Well, you say it is possible. I want to know what the fact was. Do you know what the fact was?

A. When I made the investigation, we made notes and incorporated the details in our main report. Once an item is in the report, I do not presume to remember in detail what each fact and figure of the report,—it may be that that particular item was surveyed and found that the books were inadequate for use as evidence and we rejected them. It may be one of those cases.

Q. Did you, as part of your investigation, which commenced originally in some phase as early as April 2, 1946, and became more intensive in the latter part of 1947,—did you make any investigation to determine the investment, if any, that Tom Banks had in the Northwestern Novelty Company located at Minneapolis?

A. We may have made an inquiry.

Q. Well, you say you may have made an inquiry.

A. Yes, sir.

Q. As you sit there now, you do not know whether you made such inquiry or not?

A. I do not. I know that everything on Mr. Banks' returns was followed down to it source. It may be that as I previously explained the money he reported from Northwestern Novelty Company agreed with the amount shown as distribution on the partnership return, and it may be that the books were not available, or in too bad order to make a comprehensive audit.

Q. Well, it may have been a lot of things, may it not?

A. Well, suggest some more.

Q. Yes,—in other words, you say it may have been—

A. (Interposing.) In brief, it was not used in the investigation.

Q. In other words, your answer is it may have been this or it may have been that, or it may have been this—as you sit there now, you do not know whether this item had any importance or not?

A. The item itself is unimportant and has no bearing on the case. The item is income and we made the case on a net worth basis.

Q. Now, wait a minute. You said that you made an investigation on the net worth, did you not?

A. Yes, that is right.

Q. Did you stop to investigate whether Tom Banks had any investment in the Northwestern Novelty Company as a part of your determination of net worth?

A. We must have.

Q. Well, did you?

A. I called on possibly 150 different ventures, both from rumors and from indexing from the income tax return. I cannot sit here now and tell you every venture that came in anonymously and everything taken from the return that I investigated.

Q. Mr. McKusick, this item is on black and white on Tom Banks' cash return for the year 1946. It is one of three items listed under "Income Partnership".

A. Yes, sir.

Q. Tell us—

A. (Interposing.) It is an item of income. It has nothing to do with net worth.

Q. Do you suppose for one moment, Mr. McKusick, that the Northwestern Novelty Company was paying Tom Banks an income of $1312.50 if he did not have something invested in that company?

A. Well, that is not income receivable. Now you take the matter of the Pearson News Service. There was no investment there.

Q. I see. Well, now,—

A. (Interposing.) Let me explain now to settle this issue.

Q. Okay, fine, you go ahead and explain it. Explain it fully.

A. Mr. Banks became a partner of the Pearson News Service.

Q. We are not talking about the Pearson News. We are talking about the Northwestern Novelty Company.

A. No, but you are making a large issue of this item which we must have examined because it is on the return.

Q. I do not know whether you examined it or not. I am simply asking you what you did concerning it,—what you did to determine the investment, if any, that Tom Banks had in the Northwestern Novelty Company?

A. I answered that. I said that if it is on the return, which it is, and I saw it, we followed it down to the source and it must have been that the income was properly shown on the venture's return and that the records were inadequate for an examination, or for use in ou—

Q. (Interposing.) Mr. McKusick, I am going to ask you this question once more: What investigation, if any, did you make to determine the investment of Tom Banks in the Northwestern Novelty Company of Minneapolis?

A. I personally made no investigation.

Q. All right.

A. The fellow who made the investigation, I believe, is George Zimmerman.

Q. Just a moment. I think you have answered my question.

Mr. Landrum: You say his name is Zimmerman. Is that the man sitting here?

The Witness: It might have been Zimmerman or it might have been Mr. Melbostad, but the inquiries,—the inquiries—I directed the inquiries.

Q. (By Mr. Graff.) Well, Mr. McKusick, you appreciate that I am not an auditor, nor am I an accountant.

A. That I do.

Q. My question was simple and I think you have answered it. You did not make—I am talking about you personally—did not make any investigation—

The Court: (Interposing.) He has answered that question several times. He said he did not.

Mr. Graff: All right. Thank you, Your Honor.

Q. (By Mr. Graff.) Mr. McKusick, on Government's Exhibit 70, question No. 21 reads as follows:—and I am reading first the preface to the question:

"On April 10, 1946, H. H. Clark and Thomas W. Banks purchased property located at 224 South Tenth Street, known as the Oriole Apartments, from the S. T. McKnight Company for $42,000.00. Of this total amount, $22,500.00 represented a loan from the Sons of Norway."

Now, question 21: "How much of the residue of purchase money, namely, $19,500.00, was advanced by T. W. Banks? Source."

"Answer: 50 per cent."

Now, did you have the answer to that question before you asked it?

A. I had the answer to the original figure.

Q. Do you mean the total purchase price?

A. You see—

Q. (Interposing.) You were in court the other day when Mr. Toman of the S. T. McKnight Company was here and brought in the large book showing it?

A. It was not Toman I made the inquiry of, though. It was another fellow. I personally made the inquiry.

Q. I see. So you had the information when you submitted the question?

A. I had 95 per cent of it.

Q. It was an easy matter to check about the mortgage to the Sons of Norway?

A. That did not concern the matter of the Sons of Norway.

Q. No, I mean that was an easy matter to check, was it not?

A. Oh, yes, that was purchase money. I was interested in the cash, the currency.

Q. Yes. And the question was that Thomas Banks had advanced 50 per cent of it?

A. Yes.

Q. That was the answer you did not have?

A. No.

Q. You did not have that answer?

A. I had that answer.

Q. You had that answer?

A. Yes.

Q. So you asked the question even though you already had the answer?

A. I had 95 per cent of the answer.

Q. I see. You did not indicate in the question that you knew any proportion of the answer, 95 per cent, or at all? You just asked the question?

A. Would I indicate that I know 95 per cent of this answer,—or the 5 per cent?

Q. Yes. You did not indicate that.

A. It had no bearing on the question.

Q. (By Mr. Graff.) Now, Mr. McKusick, I understand that your starting point for the net worth was December 31, 1936?

A. That is right.

Q. And in conducting your investigation concerning the so-called starting point, did you use the affidavit of the taxpayer dated July 2, 1937, identified as Government's Exhibit 33?

A. We did.

Q. I presume that from time to time you examined the affidavit rather carefully?

A. We did.

Q. Now, Mr. McKusick, attached to the affidavit were a list of certain stocks, were there not?

A. There was.

Q. Now, handing you Government's Exhibit 33, if you will examine it, I am sure that you will find that it is dated July 2, 1937, is it not?

A. It is.

Q. And attached to Government's Exhibit 33 is a list of stocks, is there not?

A. Described as worthless.

Q. There are a list of stocks attached to the affidavit described as Government's Exhibit 33?

A. That is right.

Q. And did you notice in the course of your examination that while the affidavit is dated July 2, 1937, the attachment to the affidavit describes the affidavit as having been dated as of April 8, 1937?

A. I did not.

Q. You did not notice that before?

A. When the stocks were described as "worthless" we did not pay any attention to it.

Q. And notwithstanding your frequent use of Government's Exhibit 33, or a copy thereof, you never noticed that the date on the affidavit itself and the date referred on the list attached thereto were actually two different dates?

A. They were both within the same year, so it is immaterial.

Q. Yes. One was April 8th and one was July 2nd—

A. (Interposing.) Both 1937.

Q. Yes, but you never noticed it before?

A. I may have noticed it.

Q. If you did notice it before, did you make any investigation to find whether there was any reason for the discrepancy in the two dates?

A. I knew the reason.

Q. Oh, you knew the reason?

A. I knew the reason.

Q. Then you knew there was a discrepancy in the two dates?

A. It was immaterial.

Q. Did you know of the discrepancy in the two dates?

A. Can I explain it?

Q. Well, I think you can answer it yes or no.

Mr. Landrum: Let him explain it.

Mr. Graff: Just a moment, please.

The Court: Just a moment. I will run the Court yet. (To the witness.) You may answer.

The Witness: Answer his question?

The Court: Yes.

A. Yes, I did.

The Court: Well, did you desire to make some explanation?

The Witness: I did, Your Honor.

The Court: All right.

The Witness: This affidavit had to do with the compromise settlement of some $33,000.00 of distilled spirits tax, which the taxpayer and several others were involved in. They made a concerted offer in compromise of the $33,000.00 of some four or five thousand dollars, which was rejected by the Treasury Department, and they later reappeared in the form under—Mr. O'Gordon represented the case and increased the offer in compromise, which was accepted on July 2, 1937. Both instances bear on the same thing.

Q. (By Mr. Graff.) Did you check, Mr. McKusick, to find out whether there had been an offer in compromise dated April 8, 1937?

A. There was an offer in compromise about two or three months earlier than the one accepted.

Q. Now, I have heretofore asked you some questions concerning Exhibit 221, and I do not want to cover the ground that I have covered except that I have a question that I forgot to ask you, so let me hand you Government's Exhibit 221.

(Exhibit handed to the witness.)

Q. (Continuing.) And I again direct your attention to the item of $25,000.00 as of 10-31-47, representing the investment in McCarthy's St. Louis Park Cafe of Thomas W. or Rita Banks. Now, having that before you, let me read you from the questions and answers contained in Government's Exhibit 70, question No. 6. I am reading first the preface:

"It has been disclosed that on or about January 10, 1946, A. M. Cary purchased Thomas W. Banks' interest in National Plastics Corporation and National Sound Corporation, both New York City, for $25,000.00."

Now question 6 that follows that preface reads as follows: "How much of Mr. Banks' interest in the above-described stock was owned by Harry Shepard? Give date and amount advanced by Mr. Shepard.

"Answer: Thomas Banks' interest, 50 per cent of $25,000.-00."

Did you know the answer to that question when you submitted it to Mr. O'Gordon under date of December 12, 1950?

A. I did not.

Q. And when you received the answer from Mr. O'Gordon under date of February 1, 1951, did you then correct Exhibit 221 which you now have before you?

A. No.

Q. So that you have had the information with respect to that matter ever since February 1, 1951, and we are now in May of 1952, and the exhibit was introduced yesterday, and you still had not made that change on the exhibit even though you had the information for more than a year,—is that right?

A. The amounts used in our determination reflect a correction of that amount. They did reflect a correction.

Q. Well, now, I do not think that answers what I asked you.

The Witness: Read the question back.

(The question was read.)

A. That is right.

Q. I think you testified, Mr. McKusick, that as a part of your beginning net worth, December 31, 1936, you found and gave credit to the taxpayer for no cash as of that time, is that correct?

A. That is right. We used the affidavit and we made a diligent search and found no cash.

Q. Yes. So that in your beginning net worth, which is December 31, 1936, you have no cash—correct?

A. That is correct.

Q. Now, Mr. McKusick, isn't it a fact that as a part of your rationalization and your determination and your conclusion to use the so-called net worth system, that one of the reasons that you said you wanted to use that system was that this taxpayer used a lot of currency in his transactions?

A. That is right.

Q. So that you knew that when you started this investigation, whether it be on April 2, '46, or the latter part of 1947,—you knew that this taxpayer was one who dealt in currency a good deal, is that right?

A. But I did not know that he held currency.

Q. Just a moment. Isn't that a fact, that you knew that?

A. That is right.

Q. That is right. Now, and yet notwithstanding the use of that information to come to the so-called net worth method, when you come to your beginning net worth, you give him no cash at all as of the beginning of that period?

A. I used his own statement.

Q. Well, just a moment. Isn't that a fact what I asked you?

A. Well, the exhibit will speak for itself.

Q. Well, just a moment, Mr. McKusick. I asked you since you knew and so stated to this Court and jury that this man dealt in a large amount of currency from time to time and that it was for that reason that you had resorted to the so-called net worth method, and notwithstanding that knowledge and that information so used by you, when you started the net worth of this man, you did not give him credit for any cash as of December 31, 1936?

A. That is right.

Q. Isn't it a fact, Mr. McKusick, that when you established for this taxpayer as of December 31, 1936, no cash, that you knew in September of 1937 that this taxpayer had paid some $7800.00 in cash to the Collector of Internal Revenue at St. Paul, Minnesota?

A. I knew that from a statement of Joseph O'Gordon that the taxpayer had to borrow the money in settlement—

Mr. Graff: (Interposing.) Just a moment. I object to this witness testifying to any conversation with someone else. I am asking whether he knew that fact and I move that answer go out as hearsay.

The Court: The motion is overruled.

Q. (By Mr. Graff.) So you knew when you set this man up with no cash as of December 31, '36, that actually in September of 1937 he paid $7800.00 in cash to the Collector of Internal Revenue?

A. I did not know where he got it.

Q. Just answer my question. You knew that he paid it?

A. Sure, I knew that he paid it.

Q. Is that correct,—in cash?

A. I do not know what specie.

Q. Well, you made an investigation into this matter, did you not?

A. Are you talking about cash as distinguished from cashier's checks or somebody else's money that loaned it to him?

Q. What did your investigation reveal about the money which was paid the Collector of Internal Revenue in September of 1937?

Mr. Landrum: Now, answer it completely. He has asked you what your investigation revealed. Now, tell him.

Mr. Graff: Well, now, just a moment.

A. My investigation revealed that Joseph A. O'Gordon, who then represented the taxpayer on the power of attorney, stated to the investigation agent that his client would have to borrow the money to pay his taxes.

Mr. Graff: Just a moment. I object to this witness telling here what somebody else told him, Your Honor.

Mr. Landrum: He asked him what the information revealed, Your Honor.

Mr. Graff: I beg to differ with you, counsel.

The Court: Just a moment. We have had enough of this. I think the facts have been stated in connection with the payment of this tax in 1937. Now, you asked this witness what he learned on his investigation. He has stated what he found out from the lawyer who held the power of attorney from this defendant. I think that is going far enough.

Q. (By Mr. Graff.) Did you make an inquiry at the Collector's office in St. Paul concerning that transaction which occurred in September of 1937?

A. The inquiry—

Q. (Interposing.) Now, I think you can answer that yes or no.

The Court: Just answer the question, if you can.

The Witness: I personally did not, Your Honor.

The Court: Very well.

Redirect Examination

By Mr. Lord:

Q. Mr. McKusick, showing you Government's Exhibit 221, when did you make that?

A. In late '49 or early '50.

Q. What did you make it from?

A. The general ledger of McCarthy's St. Louis Park Cafe, Incorporated.

Q. Why didn't you change that exhibit as a result of information which you subsequently acquired?

A. The statement as prepared is an accurate reflection of the information I had obtained at that time. While I objected to the figure used in this determination in accordance with my explanation on Mr. Shepard's investment, I left this unchanged because Mr. Weinstock, the accountant for the taxpayer, took a copy at the time I completed the analysis.

Mr. Lord: That is all, Mr. McKusick.

GERALD O. KLEVEN was called as a witness and, after having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lord:

Q. Where do you live, Mr. Kleven?

A. I live at 5725 Vincent Avenue South, Minneapolis.

Q. And you are married, are you?

A. Yes, I am.

Q. What is your age?

A. 35.

Q. Where do you work?

A. I work as a revenue agent in the Bureau of Internal Revenue, Minneapolis office.

Q. And what particular type of work do you do there?

A. I specialize in the examination of cases in which fraud is suspected.

Q. And how long have you worked in that type of work?

A. About six years.

Q. Well now, can you tell me how your duties either correlated with or are distinguished from the duties of a special intelligence agent like Mr. McKusick?

A. Well, my duties are to examine returns and establish the true and correct income tax and/or penalties that may be involved in a civil case—civil liabilities.

Q. Well now, in connection with cases where you work with members of the special intelligence unit, what are your duties there?

A. I work under the direction of the intelligence unit officer.

Q. And what type of work do you do there?

A. Well, it is very similar—auditing the books and records of the taxpayers, see that they conform with the returns.

Q. Well, tell me, what is your educational background, Mr. Kleven?

A. I am a graduate from the University of Minnesota in 1938.

Q. And what degrees do you have from there?

A. Bachelor of Business Administration, with a major in accounting.

Q. And have you had any other formal education in accounting?

A. I have done some study since then and passed the Minnesota State Examination last fall for certified public accountant.

Q. Well now, Mr. Kleven, when you graduated from the University, what did you do then?

A. I worked for about six years in private industry as an accountant and office manager in a small manufacturing corporation.

I worked for six years with a small manufacturing concern in Minneapolis as accountant and office manager.

Q. What was the name of that concern?

A. The General Dairy Manufacturing Company.

Q. And when you left there, what did you do?

A. I went to work for the Internal Revenue.

Q. And you have been there since?

A. Yes, I have.

Q. When were you first assigned to the Banks' case?

A. Well, my first contact with the case was to obtain the returns and go over and see Mr. McKusick, and go over his papers and all the work that he had accumulated and done during the previous years.

Q. And how long have you worked on that case from January of 1951—how long did you work on the case then?

A. I worked with Mr. McKusick until I completed my report in about May of 1951.

Q. And then what have you done since then? When did you next work on the case?

A. Well, when I was called over here to work with the United States District Attorney in January of 1952.

Q. Have you been more or less steadily working on the case since then?

A. More or less, yes.

Q. State whether or not you ever examined the books and records of Brady's Bar?

A. Yes, I have.

Q. When was that?

A. About 1946.

Q. And was that in connection with the Thomas Banks' case particularly?

A. No, it wasn't. It was an examination of Brady's Bar, Inc.

Q. And was that a routine examination of Brady's Bar?

A. More or less routine, yes.

Q. Did you see their books and records?

A. Yes, I did,—I examined them.

Q. Where was this?

A. It was at Mr. Weinstock's office in Minneapolis.

Q. And did you at that time make any reference to an investment account on the part of Thomas Banks?

A. Yes, I did. I transcribed the investment account, or a loan account of Mr. Banks.

Q. And how did you happen to do that?

A. I was requested to do so by the intelligence department.

Q. Do you have such a transcript with you?

A. Yes, I have.

Q. Mr. Kleven, showing you Government's Exhibit 222, will you tell me what that is?

A. This is a general ledger account of T. W. Banks.

Q. Is that the transcript which you made?

A. Yes, it is.

Q. Would you say that that is an accurate transcript of the account named therein and from the books and records of Brady's Bar?

A. Yes, it is.

Q. Where are the books and records of Brady's Bar now?

A. I don't know.

Q. When did you last see them?

A. I think I saw them in 1951.

Q. And where, do you recall?

A. In the intelligence unit.

Q. Do you know whether or not those books were given back to Harry Clark, or Brady's Bar?

A. I don't know of my own knowledge but I believe they were.

Mr. Lord: At this time, Your Honor, we offer in evidence Government's Exhibit 222.

(Exhibit handed to Mr. Graff.)

Mr. Graff: If the Court please, without examining the exhibit, having an opportunity to examine it, we object to the foundation for the exhibit. It appears, if I understand correctly, that this is a transcript made by Mr. Kleven. Now, this, then, constitutes secondary evidence and I do not believe that sufficient showing has been made to account for the original. It appears that the original books and records were in the hands of the Intelligence Unit in 1951.

The Court: (To Mr. Lord.) Why don't you lay a foundation?

Mr. Lord: I will do that, Your Honor.

The Court: You should always do that in introducing documentary evidence.

Mr. Hoffmann: If the Court please, to assist the Court and to expedite this trial, if the witness will by examination testify as to the authenticity of the proposed exhibit, we will waive our objection as to foundation.

The Court: Very well.

Mr. Hoffmann: We don't want to hold up the trial of this matter.

Mr. Lord: It is my understanding, Your Honor, that he has testified that he obtained these entries from the books and records—

Mr. Hoffmann: I understand that, Your Honor, but I think he should submit one more question that they are correct figures.

Q. (By Mr. Lord). Did you state that these were the correct figures?

A. I believe I did, but I will state again that they are the correct figures.

Mr. Lord: We have a return here—

The Court: Let me see that exhibit.

Mr. Hoffmann: We have no objection to the exhibit on the basis of foundation.

(Exhibit handed to the Court.)

The Court: You may proceed.

Mr. Landrum: That is received, Your Honor?

The Court: Yes.

Mr. Graff: If the Court please, we do object to it on the grounds of immateriality and lack of relevancy, but we withdrew our objection with respect to foundation.

The Court: The exhibit is received.

Q. (By Mr. Lord.) Mr. Kleven, showing you Government's Exhibit 222, what does it show with respect to the investment of Tom Banks?—or, correction—what does it show?

A. The information contained on this exhibit shows the balances due, or from Tom W. Banks to Brady's Bar, Inc.

Q. And for what years?

A. For December 31, 1941, December 31, 1942, and December 31, 1943.

Q. Would you give the amounts for those years?

A. As of December 31, 1941, there was a balance due and owing by Mr. Banks to Brady's Bar, Inc., of $6,934.42. As of December 31, 1942, there was a balance of $7,434.42 due and owing by T. W. Banks to Brady's Bar, Inc. As of December 31, 1943, there was a balance of $9,240.10 due and owing by Brady's Bar, Inc. to Mr. Banks.

Q. Now, Mr. Kleven, in the course of your investigation have you had occasion to examine the books and records of the B & S Company?

A. Yes, I have.

Q. And where was that?

A. I saw those books and records in the Intelligence Unit Office in Minneapolis in the spring of 1951.

Q. Now, Mr. Kleven, did you have an occasion to make any transcripts from those books and records?

A. Yes, I did.

Q. And which account, particularly, did you transcribe?

A. I transcribed some information from the minute book, the journal, and the general ledger.

Q. What was that with reference to?

A. With reference to the investment of T. W. Banks in the B & S Corporation.

Q. Now, Mr. Kleven, did you compile something from each of those three sources on one sheet of paper more or less?

A. In those two pieces of papers that are attached (indicating).

Q. Showing you Government's Exhibit 223, can you tell me what that is?

A. That is a transcript that I made of the B & S Corporation records that I referred to previously.

Q. Was the information which you copied on there copied accurately and concisely according to what you found in the books of that corporation?

A. Yes, it is.

Q. Do you know who was the vice president of the B & S Corporation? Do you know whether or not it would be Thomas Ewing?

A. The transcript would show who was the officer at that time.

Q. Do you know who is presently the officer?

A. No, I don't.

Mr. Lord: Your Honor, we have here a return "Not found" for one Thomas Ewing who we attempted to subpoena for the books and records of that corporation. The subpoena reads: "Thomas Ewing, Vice President of the B & S Corporation." We also have a subpoena for Simon Meshbesher and he has stated—he was in court and he stated that he did not have the books and records of that corporation, although their business address is listed as his office. We have another subpoena for Brady's Bar, 604 Hennepin Avenue, Minneapolis, Minnesota. There is no return shown on this. The Sheriff has not returned a "Not found" on it. I understand it was served upon the Secretary of State under the Minnesota Statutes.

At this time we offer in evidence Government's Exhibit 223.

(Exhibit handed to Mr. Graff.)

Mr. Graff: May I ask the witness a question concerning foundation, Your Honor?

The Court: Yes.

Q. (By Mr. Graff.) Mr. Kleven, it is my understanding that you saw the books and records pertaining to the B & S —this is the B & S Company, is it not?

A. Yes. It is a corporation.

Q. The name of the corporation is the B & S Company?

A. I believe that is correct.

Q. At the Intelligence Unit office in the spring of 1951, is that right?

A. That is right.

Q. Have you made any check to determine whether they are still at the Intelligence Unit office?

A. To my knowledge all of the original books that were in the Intelligence Unit have been brought back to the original owners.

Q. Well, did they get a receipt for them? Did the receipt indicate to whom they turned them over?

A. I don't know. I don't have too much knowledge of their procedure.

Q. Well then, you don't know what the Intelligence Unit did with the books that they had in the spring of '51?

A. No, I don't.

Mr. Graff: May we have a few moments to examine it, Your Honor?

The Court: Yes.

Q. (By Mr. Graff.) Mr. Kleven, you don't know whether the Intelligence Unit made photostats of these records? Did they at that time?

A. I do not know.

Q. The Exhibit 223 is something that a part of it you took out of the minute book, a part of it out of the journal, and part of it out of the general ledger?

A. That is correct.

Q. And the revenue office didn't cause it to be photostated, either?

A. No.

Q. Mr. Kleven, Exhibit 223 is your summary, is it not, of the examination that you made of those books in the spring of 1951?

A. A summary?

Q. It was your summary or interpretation of them?

A. I transcribed portions of the records of the minute book, and portions of the stock certificate record which shows the stockholders, and I transcribed the opening entry in the journal with regard to the purchase of the building, and I transcribed the capital stock balance in the ledger and the paid-in surplus in the ledger.

Q. Now, let me direct your attention to the small sheet on top of Government's Exhibit 223. There is a Roman numeral II and it says, "The B & S Company was incorporated on 12-2-43 under the laws of the State of Minnesota" and you have (minute book)?

A. That is right.

Q. Now, you didn't copy that, did you?

A. Not that heading there.

Q. You didn't copy this; you were making a summary of certain information, is that right?

A. In the first part of that statement, yes.

Q. And then you have the address—1234 First National Soo Line Building?

A. Yes.

Q. Now, isn't the address of Mr. Meshbesher—hasn't it been identified here as 1234 First National Soo Line Building? You didn't copy that correctly, did you?

A. 1234 First National Soo Line Building is what that is.

Q. That numeral is a "4"?

A. Yes.

Mr. Graff: Well, if the Court please, I think we will object to the exhibit on the ground that there has not been sufficient foundation to warrant the introduction of secondary evidence, which Exhibit 223 is, and it consists in part of an interpretation or a summary by this witness of some documents, books and records, and we make the further objection that they are therefore hearsay and self-serving; and we object to them on the further ground that they are irrelevant and immaterial.

The Court: Well, where are the books from which the data was taken?

Mr. Lord: Would that we knew, Your Honor. The Government would certainly not be in here trying to introduce that exhibit if we could find the books.

The Court: Well, have you any evidence to that effect?

Mr. Lord: Well, I could put Mr. McKusick on and he would tell you.

Mr. Landrum: We have got those subpoenas here, the subpoena duces tecum. We went after them in every way we could.

Mr. Lord: It is the same story on these books, Your Honor.

Mr. Hoffmann: Just a moment, if the Court please. We ask that that remark be stricken from the record and counsel admonished—

The Court: The statement of counsel may be stricken.

Mr. Lord: We have attempted to subpoena every officer we could find. In addition to that we have subpoenaed Mr. Meshbesher in whose office the books and records are. Mr. McKusick can produce,—will if the Court chooses that he do so,—a receipt showing that he returned those books to Mr. Weinstock, and I think this is discretionary with the Court as to what foundation we should lay and on the facts we submit that—

The Court: Do I understand that the books were delivered by the Intelligence Department, Internal Revenue office, to Mr. Weinstock and his receipt taken?

Mr. McKusick: It was.

The Court: The objection is overruled; the exhibit is received.

Q. (By Mr. Lord.) Now, Mr. Kleven, from your examination of the books and records of the B & S Company, and the notations and the excerpts which you made on Government's Exhibit 223, have you been able to arrive at a figure representing the investment of Thomas Banks or Rita Banks in the B & S Corporation for the various years 1943 through 1947?

Mr. Hoffmann: At this time, Your Honor, in addition to our other objection, objection is taken to the testimony

of this witness based upon this witness' use of Exhibit 223. We desire the record to show our objection to any testimony involving Rita Banks.

The Court: The objection is overruled. (To the witness.) You may answer.

A. I have made a schedule separate and apart from this exhibit in which I have shown the investment.

Q. (By Mr. Lord.) What does that show as being the investment for the year ending December 31, 1943?

Mr. Hoffmann: We ask that the record denote what counsel refers to when he says what does "that" show in the light of the witness' previous answer.

The Court: I think counsel might be specific in that question.

Q. (By Mr. Lord. Which Banks invested in that company?

Mr. Hoffmann: Just a moment, if the Court please. We object to that as calling for a conclusion and a characterization by a witness of an instrument received in evidence which speaks for itself.

The Court: You may answer the question, if you can.

A. What was the question? Repeat the question, counsel.

Q. (By Mr. Lord.) Which Banks invested in that company, Rita or Thomas?

A. Well, it shows certificate No. 3, issued January 9, 1946, 105 shares to Thomas W. Banks.

Q. Now, let me go back to the date December 31, 1943, and ask you—what investment is shown there, or what investment have you arrived at as being the investment—

Mr. Hoffmann: (Interposing.) Well, we object to that as calling for a conclusion, if the Court please.

Mr. Lord: Just a minute until I finish the question, counsel. (To the reporter.) Strike the question, if you please.

Q. (By Mr. Lord.) Will you tell me what your exhibit shows with reference to the investment of Thomas Banks and Rita Banks for the various years, year ending shown thereon?

The Court: You may answer.

A. Well, this exhibit of itself would have to be interpreted before it could be explained.

Q. (By Mr. Lord) All right, will you interpret it and tell us what it shows with reference to the investments of Thomas W. and Rita Banks in that corporation?

Mr. Hoffmann: May the record show our objection to his interpretation?

The Court: You may explain those records, if you can.

The Witness: All right.

The Court: Can you do so to a reasonable certainty?

The Witness: Yes, I can, sir.

The Court: Proceed.

Mr. Hoffmann: May the record show what papers the witness refers to for the purpose of now testifying so our cross-examination of him may be intelligently pursued?

The Witness: I have here a work paper which I have prepared and listing the entries as shown on this exhibit.

The Court: Exhibit 223?

The Witness: Exhibit No. 223.

The Court: Proceed.

The Witness: The opening entry is in 1944 in the journal and it includes as part of the investment, "Payment on

mortgage principal $200.00; mortgage expense, $148.00; legal fees, $500.00; " and a building which has been interpreted from the question No. 70 and 71—

Mr. Hoffmann: (Interposing) Now, if the Court please, we submit all of this is not responsive to the question and ask that it be ordered out of the record.

The Court: You may answer. Go ahead with your answer.

The Witness: And the question was as to the investment in the Kruze building—

Mr. Hoffmann: (Interposing) May we ask again for the purpose of our cross-examination what this witness is now reading from?

The Court: What are you using?

The Witness: This is the same work paper.

The Court: Very well.

The Witness: The Kruze Building, which was sold to the B & S Corporation in January of 1944 and which is part of this opening journal entry,—the question was: "Was payment on the Kruse Building of $6800.00," and the answer to that was, "Half invested by Tom W. Banks for $3400.00."

Mr. Hoffmann: Well, then Your Honor, so the record may be complete on behalf of the defendant, do we now understand that this witness is making these answers with respect to Exhibit 223 which he claims is a transcript of a so-called investment account upon the books of the B & S Company, a corporation, made by him, sometime previous hereto in the light of, and added to, if I may so state, Your Honor, by information that came to him from other sources and not from the books of the B & S Company?

The Court: Is that correct?

The Witness: That is correct. We are discussing the investment.

Mr. Hoffmann: If the Court please, in the light of the witness' answer we ask that all of his heretofore answers be stricken from the record.

The Court: That motion is overruled. (To the witness) Where are you getting the information?

The Witness: The information with regard to the investment of the taxpayer has to be taken from two sources, his original cost of this building, which he transferred to the corporation, plus the additional cash which he invested in the corporation.

The Court: Now, where do you get that information?

The Witness: The cost of this building, his investment in that portion, is contained in questions No. 70—

Mr. Landrum: Exhibit No. 70, the questions and answers in this case.

The Witness: And the information concerning the cash investment is contained in Exhibit 223.

The Court: And where did you get the information from which you made 223?

The Witness: That is from the books and records of the B & S Company.

Q. (By Mr. Lord) And are you now reading from a work paper wherein you correlated the information in 223 plus the information on the questions and answers, Government's Exhibit 70?

A. Yes, I am trying to correlate them.

Q. And to arrive at the total investment of this man in that company?

A. That is correct.

The Court: The jurors may retire for the luncheon hour Court will recess until 2 o'clock, Mr. Bailiff.

Q. Mr. Kleven, I believe you were making an explanation of the amounts which you found as investments in the B & S Company. Now, do you want to state and give us that explanation?

A. Yes, I will. The Government's Exhibit No. 223 of itself shows 315 shares of stock outstanding and a capital stock of $31,500.00. It also shows 105 shares in the name of Thomas W. Banks, which indicates his investment to be $10,500.00. However, with the use of Government's Exhibit Nos. 70 and 71, I have interpreted the investment to be $8,849.33 at the end of 1944, '45, '46, and '47.

Q. Have you credited him with any investment as of the end of 1943?

A. I have credited him with $3,400.00 as his portion of the cost of the Kruze Building.

Q. Mr. Kleven, in the course of your work on this matter, have you had occasion to examine the records which were made available to you concerning the 10th Street Realty Company?

A. Yes, I have.

Q. Will you tell us approximately the date on which you examined these records?

A. I saw those records in the spring of 1951.

Q. Where did you first go to find them?

A. I believe I saw those records in Mr. Weinstock's office when I was examining the retained copies of the partnership, 10th Street Realty Company.

Q. Well, now, were they with the retained copies?

A. Yes, they were with the retained copies and Mr. Weinstock and Mr. Brancheau said that this report which had been prepared by Mr. Brancheau—the information on this report was used in preparing the returns.

Q. Is that return in evidence here today?

A. Yes, it is.

Q. Well, now the—you stated that you looked at a report that was not in the form of regular bookkeeping entries in the set of books, was it?

A. No, it was a typewritten report.

Q. Did you hear Mr. Brancheau refer to that book here on the stand?

A. Yes, I did.

Q. Based upon the records which you saw there and based upon the income tax returns that you saw at that same time and which are now in evidence here in this case, can you tell me what is the investment of Thomas W. or Rita Banks in the 10th Street Realty Company?

Mr. Graff: Just a moment. The first part of the question said based upon reports that he saw there. I wonder if the question could be a little bit more explicit so we know just what records are referred to, Your Honor.

Mr. Lord: Would you read the question, Mr. Reporter?

(The question was read.)

Mr. Graff: I think, Your Honor, before he answers that question, I would like to have specified the records that are referred to in the questions and the records "he saw there."

Mr. Landrum: He has already stated that, Your Honor.

The Court: Well, Mr. Reporter, read it again.

(The question was re-read.)

The Court: The uncertain portion of that question is based on the records that this witness saw there. That is what makes it indefinite and uncertain. Of course it is proper to make your question definite and certain so there will be no question as to what the answer means.

Mr. Landrum: I believe this witness has testified, if the Court please, that in the office of Mr. Weinstock, who was the accountant for this company, he saw these records. I think that is his testimony.

The Court: What records do you mean?

The Witness: This was an operating report prepared by Mr. Brancheau,—

The Court: (Interposing) Of the 10th Street Realty?

The Witness: Of the 10th Street Realty Company, and the retained copies of their tax returns for the 10th Street Realty Company.

The Court: Now, what is Mr. Brancheau's connection with the company?

The Witness: He was operating manager and he—

The Court: (Interposing) Of the company?

The Witness: Of this building, and he made out an annual report which he gave to Mr. Weinstock, who used that in the preparation of his tax returns for the department.

The Court: You may answer the question.

A. According to the—

Mr. Graff: (Interposing) Pardon me a moment, Mr. Kleven. May I, Your Honor, have an objection to any and all further testimony by this witness insofar as his answer may pertain to Rita Banks on the ground that it is irrelevant and immaterial.

The Court: I think that is thoroughly understood.

A. Using the records of the partnership returns and Mr. Brancheau's report, the investment as of December 31, 1946, was $9,925.00, and as of December 31, 1947, was $14,603.00. This includes both capital and loans.

Q. (By Mr. Lord) Mr. Kleven, have you been in this court room during all the trial of this case?

A. Yes, I have.

Q. Have you heard all of the oral testimony as to the fact?

A. Yes, I have.

Q. And have you had occasion to examine the various exhibits introduced into evidence in this case?

A. Yes.

Q. From the exhibits in this case and from the oral testimony adduced here in this court room as to facts, are you able to make an analysis and a summary under the net worth method to show the income of this defendant from the years 1936, 1941, '42, '43, '44, '45, '46, and '47?

A. Yes.

Q. Have you reduced such a summary to chart form.

A. Yes, we have.

(Government's Exhibit 224, consisting of six parts, marked for identification.)

Q. Mr. Kleven, showing you Government's Exhibit 224, can you tell me what that is?

A. That is a typewritten copy of the figures that I prepared of the net worth summary.

Q. Was that prepared more or less under your general supervision?

A. Yes, it was.

Mr. Lord: At this time, Your Honor, we offer in evidence Government's Exhibit 224.

(Exhibit handed to Mr. Graff.)

Mr. Graff: If the Court please, Government's Exhibit 224 consisits of six pages of many, many figures. Has the Court seen it at all?

The Court: Not at all.

Mr. Lord: I will supply one to the Court.

Mr. Graff: I think the Court should have one. It will take some time to examine this exhibit, Your Honor.

The Court: Is there further examination of this witness on direct?

Mr. Landrum: If Your Honor please, yes. Your Honor, of course, I am sure, realizes what the witness has presented is a summary and an analysis of the testimony in this case going to show the net worth of this defendant, which I believe has been admitted in a number of cases, even one that Your Honor, if I may be forgiven, tried,—the Gleckman case, and if Your Honor please, necessarily if they want time to go over that exhibit, they must necessarily go over all of the testimony in this lawsuit, because that is what is contained in it. I have no doubt at all but what it is a summary and the Courts have repeatedly held that such a summary is admissible as an aid to the Court and to the jury.

Mr. Graff: I am just asking Your Honor for some time to examine it, is all.

The Court: Well—

Mr. Landrum: (Continuing) Now, if I might say this, if Your Honor please, following this exhibit we have an enlargement of it which is not in the court room. It will take us probably 10 or 15 minutes to bring it in here. We propose to follow this exhibit with the enlargement, and then go over that enlargement in detail for the benefit of the Court and jury.

So, if Your Honor was going to give them ten or fifteen minutes to look at it, we will go get the other exhibit and bring it in the court room, if I might be permitted to suggest that.

The Court: Will that be sufficient time?

Mr. Graff: I hardly feel so, Your Honor, and I think I can demonstrate that if I may be permitted to ask this witness a question or two.

Mr. Lord: As to foundation?

Mr. Graff: Yes, with reference to proposed Exhibit 214.

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The Court: Well, if you have some questions as to foundation, you may make that inquiry at this time.

Mr. Graff: Yes.

Q. (By Mr. Graff) Did you prepare Government's Exhibit 224, Mr. Kleven?

A. I prepared the figures that are used on that exhibit.

Q. I mean, of course, you did not do the mimeographing, but I mean, you prepared the report?

A. That is correct.

Q. And may I ask you when you prepared it?

A. That was last Friday night.

Q. You prepared it last Friday night? A. Yes, sir.

Q. And then you had it mimeographed? A. Yes, sir.

Q. Had you worked it up preparatory to that time?

A. Yes, I had. That was modified at that time.

Q. I see, but did you have it substantially completed last Friday night?

A. Yes.

Q. And then you made some modifications of it?

A. That is correct.

Q. Were the modifications that you made on Friday night, without going into them,—were they minor?

A. Of a minor character.

Q. Of a minor character. So that you had the exhibit all prepared with the exception of those minor corrections before the trial of this case?

A. That is correct.

Q. And how long before the trial of this case?

A. Well, the bulk of it, I would say, was May of last year.

Q. May of 1951? A. That is correct.

Q. And do you know about how long it took you to prepare it,—man hours, just roughly?

Mr. Landrum: Go ahead, tell him, if you know.

A. That is the result of all of our work in the investigation.

Mr. Graff: I think, Your Honor, it must be very apparent that ten or fifteen minutes is not quite enough to examine something that has apparently taken some time in its preparation.

The Court: Have you the enlargement of this exhibit ready at this time?

Mr. Landrum: We have. It is down in the United States Attorney's office. It is on an easel. Do you desire to proceed with the examination of this witness with reference to the enlargement of the exhibit—the enlargement, Your Honor, it will be much clearer. For the purpose of clarifying the situation, the enlargement is much better. It is impossible to do it with this small one.

Mr. Graff: I rather disagree with that conclusion. I assume that this witness will have no difficulty doing it from the mimeographed copy that he prepared. I do not suppose that the enlargement would serve any purpose as far as this witness is concerned.

The Court: Well, nothing except to place the data before the jury.

Mr. Landrum: That is right.

Mr. Graff: Well, the implication of counsel's statement was that this witness, it would be so much easier for him with the enlargement. I rather disagree with that.

Mr. Landrum: If the Court please, I want to make this thing easier for all of us and that enlargement will do it.

Mr. Graff: Well, may I say in that respect, Your Honor, that I am not always committed to doing things the easiest way. I want to do them the right way.

The Court: That is right.

Mr. Graff: And it occurs to me that until this exhibit is in evidence that it should not be exhibited to the jury and I suggest that at the present time no sufficient foundation has been laid for its reception into evidence. It occurs to me that there has been no foundation as yet laid for it, so we will object to it and its reception into evidence at this time on the ground that no sufficient foundation has been laid for it.

The Court: Let me ask you, Mr. Kleven, is the data forming the basis for Exhibit 224—is it in evidence in this case?

The Witness: It is in evidence in the form of Exhibits or testimony.

The Court: Either in these exhibits that have been received in evidence or oral testimony of witnesses?

The Witness: Yes.

The Court: In addition to that data or that evidence, you have made calculations, have you, yourself?

The Witness: Yes, I have.

The Court: And have inserted them in Exhibit 224?

The Witness: That is correct, sir. There are calculations that are necessary for depreciation, and so forth, that have been made and summaries of items in evidence.

The Court: Is this chart or enlargement different from Exhibit 224?

The Witness: It is exactly the same.

The Court: It is merely an enlargement, did I understand?

The Witness: That is right, it is an enlargement of this exhibit.

The Court: Now, gentlemen, such exhibits as 224, that has been referred to by this witness in his testimony and has been offered by counsel for the Government,—the attorneys for the defendant are entitled to some time to make a study of the exhibit and to make such objections as they may desire, but I think we should proceed with the trial of this case.

Now, I have not seen the exhibit that is to be brought in, as mentioned by counsel for the Government, but this witness has stated that it is exactly like Exhibit 224. I think it may be brought in and counsel may proceed with the examination of this witness. If it is found to be absolutely inaccurate or for any reason not admissible, it will be necessary to strike it from the record and instruct the jury that it is not competent evidence and that they must wholly disregard it in this case. However, if it is found to be competent and material, it will be received.

I know there has been controversy about whether such exhibits as this are admissible. I think in recent years, anyway, they have usually been received and the action of the trial court in such cases has been sustained by the Courts of Appeals and by the Supreme Court. So I think you may move in your proposed exhibit, the enlargement of Exhibit 224. In the meantime the Court will recess for ten minutes.

Mr. Hoffmann: May we say one thing at this time, Your Honor?

The Court: Yes.

Mr. Hoffmann: I trust the Court, prior to its statement now completed as part of the record, was mindful of this witness' testimony in response to the question of the District Attorney as to what the computations of this witness, as represented by 224, were based upon. The record, I am certain, Your Honor, will disclose the answer of the witness to have been that his computations, as now reduced to 224 and as

proposed to be reflected by the chart that the District Attorney refers to, were based upon, he said, "All of the Exhibits in this case, and" most important, Your Honor, "all of the testimony in this case"—which means up to the moment of his so speaking. He said that he was in the court room all of the time during the course of this trial; that he took into consideration all of the testimony adduced up to the time of his speaking, and then, upon a question put to him by Mr. Graff, it develops that the chart here referred to as Exhibit 224 was prepared last Friday night, May 23rd, and that, in the main, Your Honor, the witness' testimony went on to relate that it was prepared by him a long time prior to the commencement of the trial, but in effect as to some minor alterations, had only those changes as of the time of last Friday night.

Your Honor, the witness testified that he made the exhibit in 1951, and the Government's offer, simply and briefly, our point is, is based upon this witness' statement in response to the foundation questions that this exhibit reflects his understanding and acceptance and interpretation of all of the evidence in this case.

Mr. Landrum: May I say a word, Your Honor?

The Court: Yes.

Mr. Landrum: Counsel has misquoted just one little word. That little word was it was based upon the testimony as to "facts" in this case,—facts. Testimony as to facts is what the witness said.

Mr. Hoffmann: Your Honor, I shall be glad in behalf of the defendant to have the District Attorney in behalf of the Government state that is the basis of their offer as to foundation of this exhibit, because now it is completely obvious that they are asking this witness to interpret testimony and determine what part of the testimony constitutes a fact and what part is rejectable to him. It is, therefore, an invasion of the province of the jury.

Mr. Landrum: I do not care to argue it any more.

The Court: Well, it is unnecessary for the Court to rule at this time, I think. The exhibit may be brought in.

Mr. Lord: If Your Honor please, the enlargement of the exhibit mentioned as Government's Exhibit 224 is now in court and we ask that it be marked by the Clerk.

The Court: It may be marked as an exhibit in the case.

Mr. Hoffmann: I take it, the record may show, Your honor, that all we have stated applies to the proposed exhibit as well and with full force as it applies to 224.

The Court: That may be understood.

Mr. Lord: At this time, if the Court please, we offer Government's Exhibit 225 into evidence.

The Court: A ruling on the admission will be withheld for the time being.

Mr. Lord: May I examine the witness?

The Court: You may proceed. You may use the exhibit in the examination of this witness.

Mr. Lord: If the Court please, there is another sheet in the back of this exhibit which we are not offering in evidence at this time.

Mr. Graff: If the Court please, did I understand that this was an exact copy of 224?

Mr. Lord: That is my understanding, sir, that the witness has testified that the words and figures on there are an exact copy.

Mr. Graff: My understanding was that it was an exact copy of 224. Unless I have an erroneous copy, it is somewhat different from my copy.

Mr. Hoffmann: It is not at all similar to 224 as to the first page, Your Honor. I should not say that. It is not identical with the first page.

Mr. Landrum: It looks like it to me.

Mr. Lord: I note that the—

Mr. Hoffmann: (Interposing.) Just a moment, counsel.

The Court: I see no difference except the years up at the top.

Mr. Graff: My understanding was that it was identical. May I point out, Your Honor, that at least the copy which I have,—mine has 1936, 1937, 1938, 1940, 1941, 1942, 1943, 1944, 1945, 1946, and 1947. If I observe correctly, Exhibit 225 before me has not those years. It has 12-31-36, 12-31-41,—

The Court: You are correct about that.

Mr. Graff: Yes. Well, I mean, I may have labored under a misapprehension. My understanding was it was an exact copy except that it was an enlargement.

The Court: Well, the difference may be explained in the testimony.

Q. What general procedure did you follow in setting up this chart? Let us start with what you did with the figures which you have in the column under 1936.

Mr. Hoffmann: May, first, Your Honor, with respect to each of such questions as now propounded by the District Attorney to this witness, there be for record purposes and for cross-examination purposes, a determination of where from the figures that the witness refers to came to him?

The Court: (To Mr. Lord.) You may include that in your question.

Q. (By Mr. Lord.) I have not asked you for figures particularly, but you may tell, if you will, how you constructed this chart and what the chart means generally. We will go into figures later.

A. This chart, No. 225, consists of six pages. The first four sheets consist of assets, various classifications of assets and detailed listings of each type of assets are included in these first four sheets. The fifth sheet is a list of liabilities, and the sixth sheet is a computation of income based on the net worth method.

Q. Now, Mr. Kleven, is it correct to say that the lines as they run across, across horizontally, starting with line 1, represent a particular asset and the amount which his investment in that asset is worth as of each year?

A. As of the end of each year.

Q. Now, I note, Mr. Kleven, that there is a jump from the year 1936 to the year 1941, and before going into the figures, based upon the facts in this case as you have stated, and the evidence adduced here, and the exhibits, could you tell me why your chart jumps from 1936 to 1941 without having the intervening years in there?

Mr. Hoffmann: Just a moment, if the Court please. We object to the form of question, first, for the reason that it asks this witness to determine a fact from the evidence in this case. We submit the lack of foundation is demonstrated by the very question for it calls from this witness for an interpretation or characterization of someone else's testimony which is not, as we understand it, permitted to be done by anyone except the jury and, therefore, invades the province of the jury. We submit that when counsel asked this witness if he took into consideration for the purpose of any one figure on this chart facts, that counsel refers to facts as this witness understands facts to have been established by evidence. We cannot, Your Honor, concede or submit that it is this witness' prerogative to interpret testimony except what he desires as a fact, and reject what he pleases as not

established as a fact for the purpose of this or any other testimony.

The Court: Do you have the question in mind?

The Witness: Yes, I do.

The Court: You may answer it.

Mr. Hoffmann: Now, if the Court please, to save time, may that same objection—our position is outlined by that statement—run to any other testimony that this witness gives with respect to any figure on this chart?

The Court: That is agreeable to the Court.

Mr. Hoffmann: And the same objection, of course, we trust, may run on this witness' testimony with respect to 225 as runs to 224?

The Court: That is agreeable to the Court. (To the witness.) You may answer the question, Mr. Kleven.

A. The years 1937, '38, '39, and '40, are not included in this chart because sufficient evidence was not found to produce an accurate net worth for those year-ends.

Mr. Hoffmann: We submit that that go out as a conclusion.

The Court: The motion is denied.

Q. (By Mr. Lord.) Have you examined the Government's exhibits here as to income during that period '36 to '41?

A. Yes, I have examined the income statements from the tax returns prepared by the taxpayer for those years.

Q. Does the fact that you have entered the year 1941 here mean that you were able to arrive at this man's net worth as of that date?

A. Yes, it does.

Mr. Graff: Just a moment. If you will wait, please, until we have an opportunity of making an objection,—we

object to that question as being leading and suggestive and assuming facts not in evidence.

The Court: The objection is overruled.

Q. (By Mr. Lord.) Did you answer?

A. I said, "Yes, it does."

Q. Mr. Kleven, referring your attention to line 1 on the first page of Government's Exhibit 225,—can you tell me where you got the information in the exhibits with which you arrived at the figures set out there?

Mr. Landrum: Line 1, you are referring to?

The Witness: Yes, that was obtained from Exhibit No. 72.

Q. (By Mr. Lord.) Mr. Kleven, I show you Government's Exhibit No. 72. By looking at Government's Exhibit No. 72, can you tell me where you got the first figure of $63.39 listed under 12-31-41?

A. That was obtained from Government's Exhibit 72.

Q. And what does that show?

A. $63.39.

Q. Do the other figures on that line as set out correctly reflect the balance in the Marquette National Bank under the various dates which they appear from that exhibit?

Mr. Graff: Just a moment. I object that that question is leading, asking this witness for facts which apparently appear on Exhibits. I haven't any objection to the question if he directs this witness' attention to an exhibit and asks whether those figures appear on the exhibit.

The Court: Very well. I think that is a very good way to answer the question. Refer to the exhibit and answer what appears at various times during certain years on that exhibit.

Q. (By Mr. Lord.) Mr. Kleven, on Government's Exhibit 72, can you tell me what appears as the balance as of the 31st day of December, 1942?

A. $637.49.

Q. And as of the 31st day of December, 1943?

A. $1,373.90.

Q. And as of the 31st of December, 1944?

A. $899.45.

Q. And as of the 31st of December, 1945?

A. $2,461.65.

Q. And as of the 31st of December, 1946?

A. $2,177.79.

Q. And as of the 31st day of December, 1947?

A. $2,985.77.

Q. Mr. Kleven, directing your attention to line 2 of Government's Exhibit 225 and the first page thereof, can you tell me where you got the information with which you—

The Court: (Interposing). In the first place, I desire to interrupt. (To the witness.) What is line 1?

The Witness: That is the bank balance as of December 31st per the bank ledger card.

The Court: Whose bank balance?

The Witness: Mr. Banks' in the Marquette National Bank.

The Court: I think that clears up the situation. You may proceed.

Q. (By Mr. Lord.) What is line 2?

A. Line No. 2 is the bank ledger balance in the name of Rita Banks in the First National Bank of Minneapolis.

Q. And what Government exhibit contains the information with which you arrived at those figures?

A. Government's Exhibit 88.

Q. Handing you Government's Exhibit 88, I am going to ask you to give the various year-end balances for the years '36 through '47, with the exception of the years 1937, '38, '39, and '40.

A. The balance as of December 31, 1936, was $152.30; the balance as of December 31, 1941, $294.37; the balance as of December 31, 1942, $367.48; the balance as of December 31, 1943, $1,050.93; the balance as of December 31, 1944, $2,696.96; the balance as of December 31, 1945, $11,246.72; the balance as of December 31, 1946, $679.53; the balance as of December 31, 1947, $3,122.31.

Mr. Hoffmann: Your Honor, may the record show, by the witness' testimony, what account sheet he is reading from—not as to exhibit number but the name of the account.

Mr. Lord: I think that the account sheets are readily available to counsel on either side, Your Honor. They are not clearly identified. We will be here the rest of the week if he is going to identify each page. It is a running account.

Mr. Hoffmann: If the Court please, these have been received in evidence as Government's exhibits and they were identified, supposedly at that time, and they were received over our objection with the understanding that their relevancy and materiality would be demonstrated by the witness.

The Court: Mr. Kleven, can you identify the sheet from which you have been giving the data?

The Witness: It is the commercial deposit ledger of the First National Bank, Minneapolis, Minnesota. The customer's name is Rita Banks.

Mr. Hoffmann: We move that all the testimony given by the witness with respect to line 2 of Government's Exhibit 225 go out on the grounds heretofore stated.

The Court: The motion is overruled. You have a standing objection—

Mr. Hoffmann: All right. With that understanding, we will save a lot of time, Your Honor.

The Court: Very well.

Q. (By Mr. Lord.) Mr. Kleven, line 3 on Government's Exhibit 225, can you tell me what that is?

A. That represents two savings accounts in the First National Bank.

Q. And in whose name?

A. One of these was in the name of Mrs. Thomas W. Banks and the other in the name of Rita Banks.

Q. What exhibit numbers are they contained on?

A. Exhibit Nos. 89 and 90.

Q. Handing you Government's Exhibit 89 and Government's Exhibit 90, can you tell me how you arrived at the figures which you use here on line 3?

Mr. Graff: I would rather have the question, what exhibit he gets the figures from rather than how he arrives at them. I assume they come from some exhibit.

Mr. Lord: If the Court please, there are some of these figures that come from the exhibit and some from oral testimony.

The Court: You give the exhibit if you can do so, if it is readily available,—tell where you get that information.

The Witness: Yes, I will.

A. Exhibit No. 89 shows $1.03 as of December 31, 1936; Exhibit No. 90 shows a balance of $5.82, including interest from the prior year.

Q. (By Mr. Lord.) Have you added those numbers together to arrive at this figure then?

A. The total of those two figures is $6.85; the balance as of December 31, 1941, is $1.03 from Government's Exhibit 89 and $6.09 from Government's Exhibit 90, for a total of $7.12.

Q. You can explain the fact that you have entered $7.12 as being the balance through 1947?

A. The exhibit shows a reducing balance for the years commencing in 1944, but the oral testimony of the auditor from the First National Bank said that the taxpayer could claim the total amount at any time he chose, so that balance has been carried on straight through 1947.

Q. Now, with reference to line 4 of Government's Exhibit 225,—from what Government's exhibits did you obtain the information which you used in making that line?

A. That is Government's Exhibit 80.

Q. What is Government's Exhibit 80? What does that show?

A. That is the account of Thomas or Rita Banks in the Anoka Bank. The balance as of December 31, 1942, $492.98; the balance as of December 31, 1943, $347.88; the balance as of December 31, 1944, $1,004.38; the balance as of December 31, 1945, $1,365.20; the balance as of December 31, 1946, $2,558.57; the balance was of December 31, 1947, $1,788.88.

Q. Now, with reference to line 5 on Government's Exhibit 225, can you tell me from what exhibit you got the information which you set out on that line?

A. Exhibits No. 77 and 78.

Q. Now, will you explain what Government's Exhibits 77 and 78 are, and how you used them?

A. These are the savings accounts of Thomas W. Banks and Rita Banks.

Q. In what bank?

A. That is the Grand Marais State Bank, Grand Marais, Minnesota. The balance as of December 31, 1943, $175.00; balance as of December 31, 1944, $476.95; balance as of December 31, 1945, $781.75.

Q. I note that your chart contains a figure of $781.95. Which is correct?

A. The 75 cents.

Q. What is the balance as of the next year, then?

A. December 31, 1946, $1,114.25; balance as of December 31, 1947, $825.67.

Q. Where did you get the information,—from what exhibit did you get the information that you have used to enter the figures shown on line 6 of Government's Exhibit 225?

A. That is contained from Exhibit No. 82.

Q. Showing you Government's Exhibit 82, will you tell us why you put this figure on that line?

A. This is a check from Jamieson & Company, dated July 16, 1947, pay to the order of Rita L. Banks, for $2,488.74. On the reverse side this check was endorsed "Reta L. Banks", with no further endorsement. The bank cancellation or perforation, shows that this entered the bank, cleared the bank on February 7, 1948. Therefore it was held on hand as of December 31, 1947.

Q. Mr. Kleven, what have you done with reference to this line "Total cash", which appears under line 6 of Government's Exhibit 225, what does that represent?

A. That represents the addition of lines 1 through 6.

Q. And can you tell me what the total cash and Government bonds you arrived at in the name of this defendant for the years ending December 31, 1936, 1941, through '47?

A. The total cash was $159—

Mr. Graff: (Interposing) The question was, Mr. Kleven, cash and bonds.

Mr. Lord: I believe that may be right and I will amend the question.

Q. (By Mr. Lord.) The total which you have charged as cash for the year 1936, for the year 1941 through '47?

A. The total cash as of the end of 1936 was $159.15; December 31, 1941, $364.88; December 31, 1942, $1,505.07; December 31, 1943, $2,954.83; December 31, 1944, $5,084.86; December 31, 1945, $15,862.64; December 31, 1946, $6,537.26; December 31, 1947, $11,218.49.

Q. Now, Mr. Kleven, I direct your attention to that portion of Government's Exhibit 225 and the first page thereof under "U. S. Government Bonds", line 7,—can you tell me what exhibit you used to arrive at the figures which you have entered there?

A. Government's Exhibits 97 and 98.

Q. Are they both on line 7, Mr. Kleven?

A. There is one bond in Exhibit 98 and four bonds in Government's Exhibit 97.

Q. Again referring to line 7, can you tell me what you charged as being an asset as represented by his investment in bonds for the year ending December 31, 1941?

Mr. Graff: I object to that question on the ground that it is leading and it is suggestive. This witness is explaining the chart that he prepared. He is doing it from certain exhibits.

The Court: You may make an explanation of line 7.

A. That represents the summary of four series "E" bonds in Government's Exhibit 97, two $100.00 bonds, two $25.00 bonds, and one $500.00 bond at cost price; for a total of $562.50. This balance was the same for December 31, 1942, '43, '44 and '45. These bonds were redeemed in 1946.

Q. (By Mr. Lord.) Can you explain to me line No. 8 on Government's Exhibit 225? What exhibit number was that information taken from?

A. From Government's Exhibit No. 97 and 96. The balance as of December 31, 1942, consists of one $500.00 bond at a cost price of $375.00; the balance as of December 31, 1943, consists of nine $1,000.00 bonds, two $500.00 bonds, and two $25.00 bonds, at a cost price of $7,537.50.

Mr. Graff: May the record show, Your Honor, what exhibit the witness is now reading from?

Mr. Landrum: He has got the memorandum he prepared for his own use.

Mr. Graff: Just a moment.

Mr. Landrum: It is not any exhibit.

Mr. Graff: Just a moment. May the record show what exhibit the witness was reading from?

The Court: I think the witnes has stated Exhibits 97 and 98.

Mr. Graff: Well, I submit, Your Honor, he was not.

The Court: Very well. (To the witness.) What exhibit are you getting this information from?

The Witness: The information that I wrote down here and have summarized is from Government's Exhibits 96 and 98.

The Court: Very well. In whose name were these bonds?

The Witness: These bonds were issued in the name of Mrs. Rita L. Banks or Mr. Thomas W. Banks.

The Court: Some in each?

The Witness: Most of them jointly.

Mr. Graff: If the Court please, I would like to ask the witness a question, if I may, at this time with respect to what he was testifying from concerning the exhibits in his present testimony.

Mr. Lord: If the Court please, the question I asked the witness is from what exhibits did you obtain the information which you used in arriving at the figures shown on this chart. Now, the witness has the exhibits on his lap and whether or not he has a memorandum to help guide him to use and expedite this trial is immaterial.

Mr. Graff: Do you admit, counsel, then that he was using something else?

Mr. Lord: I haven't admitted anything.

Mr. Graff: Just a moment, please. Do you admit that he was using something else than the exhibits which are in evidence in answer to your question?

Mr. Lord: No.

Mr. Graff: May I ask the witness a question, Your Honor?

The Court: Yes.

Q. (By Mr. Graff.) Mr. Kleven, in answer to the preceding question were you using and reading from something which was not an exhibit in evidence in this case?

A. That is true.

Q. (By Mr. Lord) Mr. Kleven, was the analysis which you had in your hand along with the Government's Exhibit merely a computation made by examining the exhibit?

A. Yes, I need some form of a summary to total that.

Q. You mean that it would be difficult for you to add up those thousands of dollars in your head while you sit on the witness stand?

Mr. Graff: Just a moment, I think that is—

The Court: (Interposing.) You may disregard the last question of counsel. Is there anything further?

Mr. Lord: Yes, Your Honor.

The Court: You may proceed.

Q. (By Mr. Lord.) Where were you, Mr. Kleven, with reference to the numbers?

A. The total cost value of these "E" bonds as of December 31, 1943, is $7,537.50; the total cost value of these bonds as of December 31, 1944 was $19,162.50; the total cost value of these bonds as of December 31, 1945, was $23,662.50; the unredeemed bond has a cost value of $18.75 as of the end of 1946, and as of December 31, 1947, $18.75;

Q. And what exhibit is that shown in?

A. That is shown in Exhibit No. 96.

Q. Now, with reference to line No. 9, can you tell me what evidence you used in arriving at the figure which you have set out there?

A. That value as shown there as of December 31, 1936, of $200.00, is a United States Government Bonus Bond as admitted in the taxpayer's affidavit, Government's Exhibit 33. There are no redemption figures for that bond and that has not been set up in subsequent years.

Q. Would you read me that section of Government's Exhibit 33 wherein that Bonus Bond is mentioned?

A. "That I own a Government Bonus Bond in the amount of $200.00 which I understand are exempt from attachment for a Government indebtedness."

Q. Now, have you added the total of U. S. Government Bonds which you have mentioned with reference to this exhibit, which are in evidence?

A. Yes, I have.

Q. And what did you arrive at as being his investment in such bonds for the years shown on this chart?

A. The total of such bonds was $200.00 as of December 31, 1936; $562.50, at the end of December 31, 1941; $937.50, as of December 31, 1942; $8,100.00 as of December 31, 1943; $19,725.00 as of December 31, 1944; $24,225.00 as of December 31, 1945; $18.75 as of December 31, 1946; $18.75 as of December 31, 1947.

Q. Now, have you made what is here termed a "Grand Total" of his cash and United States Government Bonds for the years shown on this chart?

A. Yes, I have.

Q. And what is the total ending December 31, 1936?

A. $359.15 as of December 31, 1937; as of December 31, 1941, $927.38; as of December 31, 1942, $2,442.75; as of December 31, 1943, $11,054.83; as of December 31, 1944, $24,809.86; as of December 31, 1945, $40,087.64.

Q. Is that the line in which you stated that your number was in error?

A. Yes.

Q. Does that error appear in the total?

A. Yes, it would.

Q. You would actually be some off then, would you not?

A. 20 cents.

Q. Well, then, what should this number be here on the bottom of your grand total as of December 31, 1945?

A. $40,087.44. As of December 31, 1946, $6,556.01; December 31, 1947, $11,237.24.

Q. Mr. Kleven, directing your attention to the second page of Government's Exhibit 225, and line 10 thereof, — will you tell me from what Government's Exhibit, — what evidence you got the information which you used to make that one?

A. Exhibits No. 70 and 71.

Q. Will you read that portion of Government's Exhibits 70 or 71, which pertains to figures you have set out in line number 10?

A. This question pertains to bail bond given to Rubin Shetsky.

Mr. Landrum: Read it, please.

The Witness: Yes. "Question: How much of the above total, $20,400.00 was advanced by Thomas W. Banks?

"Answer: $5,000.00 given to A. M. Carey by T. Banks, still outstanding."

And the date of that —

Q. (By Mr. Lord, interposing.) Mr. Kleven, I believe that in order to establish the first date you should read more of that question, should you not?

A. All right.

"On August 8, 1945, A. M. Cary transmitted the following to the Walter Lemon Agency, St. Paul, Minnesota: Cashier's check No. 56312 for $5,000.00, cashier's check No. 36747 for $5,000.00, bank money order No. 65061 for $5,400.00, A. A. Berenson check No. 1611 for $5,000.00," for a total of $20,400.00.

Q. Now, will you finish reading —

A. Item No. 3 was purchased by A. M. Cary in the amount of $5,400.00, and that is the item that is referred to in the answer to question No. 3 in which was stated "$5,000.00 given to A. M. Cary by T. Banks still outstanding."

Q. Now, explain the figures on the chart, then, if you please.

A. Well, these checks were purchased in August, 1945. Therefore this $5,000.00 was outstanding as of December 31, 1945, December 31, 1946, and December 31, 1947.

Q. Now, can you explain the figures which you have entered under line 11 of Government's Exhibit 225?

A. Information for that is also contained in Government's Exhibits Nos. 70 and 71.

Q. Will you read the question and the answer, and if there is a statement preceding it which explains the question, I would like to have you read that, too.

A. Preface to question No. 4: "Check No. 5139 dated July 7, 1945, issued to Rita Banks by Blue Goose Resort, Inc. in the amount of $5,000.00 bears the endorsement of payee, A. H. G. Lee and California Bank, Los Angeles, California.

"Question: Does this transfer of funds represent a loan to Mrs. Banks' brother or does it represent an amount transferred to him for investment by Thomas W., Rita Banks, or both? Give purpose, total funds advanced, and dates and amounts of any repayments.

"Answer: Loan to Hardy Lee, still outstanding."

Q. Can you explain your figure there?

A. The $5,000.00 loan was outstanding as of December 31, 1945, December 31, 1946, December 31, 1947.

Q. Now, with reference to line 12 where it says, "M. J. O'Connor note," — can you explain that line?

A. Information on that note is contained in Government's Exhibits 208, 209, and 210. These exhibits show that

a $3,000.00 loan was made to Michael J. O'Connor on February 21, 1947, and that it was paid in full, January 17, 1951. The note has so stated. That indicates that the balance receivable as of December 31, 1947 was $3,000.00.

Q. There is some indication of a compromise in those exhibits, is there not?

A. Yes, there is.

Q. In the light of that, can you explain the figure of $3,000.00 which you have used here?

A. Well, that compromise was not paid until 1951.

Q. (By Mr. Lord.) Was that still an outstanding obligation as of December 31, '47 in that amount?

A. Yes, it was.

Q. Now, with reference to line 13 of Government's Exhibit 225, the Quality Drug Company, — can you explain that line?

A. Information for that line comes from Government's Exhibits 70 and 71.

Q. Will you read that part of those questions and answers and the prefaces thereto which is necesary to help the jury and the Court arrive at an understanding of why you set that line up as you did?

A. This is question No. 15, the preface: "It appears that during 1943 and 1944, Ferdinand Hollen operated after-hour off-sale liquor establishments at the Quality Pharmacy and Phoenix Drug Co. both in Minneapolis. He stated under oath on December 11, 1947, that he owed Harry Shepard $7,500.00. Since Thos. W. Banks and Harry Shepard each reported 25% of the profits from liquor sales made by Hollen at the above-named stores, it is possible that each have shares in this loan to Mr. Hollen."

Q. I can't hear you, Mr. Kleven. Would you read a little louder and more distinctly, please?

A. (Continuing.) "Question: How much did Mr. Banks advance, directly or indirectly, to Mr. Hollen?

"Answer: 50% Nov. 1st, 1944 $5,000.00
Jan. 1st, 1945 1,500.00
Apr. 1st, 1945 1,000.00." — for a total outstanding of $7,500.00, of which 50 per cent would be $3,750.00 as of December 31, 1945, December 31, 1946, and December 31, 1947.

Q. Now, with reference to line 14 of Government's Exhibit 223 —

A. That also comes from Government Exhibits Nos. 70 and 71.

Q. Would you read the pertinent portions of those exhibits?

A. This is question No. 26 (D): "Question: Does Thomas W. Banks have any loans outstanding to Thomas E. Ewing or Florence Ewing? State date and amount of advances?

"Answer: $10,000.00 about Sept. 30th, 1944." — which indicates that there was $10,000 outstanding as of December 31, 1944, and December 31, 1945, and December 31, 1946, and December 31, 1947.

Mr. Graff: Now, I would like to have the record show, Your Honor, that while the witness purported to read from Exhibit 70, the last portion of it for the years '45, '46, and '47 was not read from Exhibit 70 and is a conclusion of this witness. Now, I move that it go out as being a conclusion of the witness, the witness not having adduced any evidence or any exhibit to support his conclusions for the years '45, '46, and '47 on Exhibits 70 or 71.

The Court: (To the witness.) You may explain why you answered as you did, if you have any explanation.

The Witness: This question clearly indicates that this loan was outstanding as of all of those dates, if you will listen to the question —

Mr. Graff: Just read the question and answer.

The Witness: That is what I mean. Listen to it. It says, "Does Thomas W. Banks have any loans outstanding to Thomas E. Ewing or Florence Ewing? State date and amount of advances?"

Mr. Graff: Now will you read the answer, please?

The Witness: "Answer: $10,000.00 about Sept. 30th, 1944."

Mr. Graff: All right. I renew my motion, Your Honor.

Mr. Landrum: Well, of course, the questions and answers weren't given until 1950 and he said it was outstanding then.

Mr. Lord: It is in the present tense — "Does Thomas W. Banks have any loans outstanding? — Give date and amount." He said $10,000.00 in '44. That is a legitimate conclusion.

The Court: (To the witness.) Did you find any data showing that the loans had been paid or cancelled, or anything done with them?

The Witness: No, sir.

Mr. Graff: May I submit it to the Court, Your Honor?

The Court: Yes.

(Government's Exhibit 70 handed to the Court.)

The Court: Is there an unanswered question or a motion pending, Mr. Reporter?

(The motion was read.)

The Court: The motion is overruled. You may proceed.

Q. (By Mr. Lord) Mr. Kleven, did you finish your explanation of the line?

A. Yes, I did.

Q. Now then, directing your attention to line 15 of Government's Exhibit 225, can you tell me how you arrived at that figure?

A. That comes from Government Exhibits Nos. 103 and 104.

Q. Will you explain that figure, please?

A. This is an account in the accounts receivable ledger in the name "Thomas Banks' — residence." November 19th, there is an entry for a credit of $2,000.00. This credit remains as a balance as of December 31, 1947.

Q. Now, with reference to line 16 of Government's Exhibit 225, can you explain that line?

A. Mr. Wickers orally testified that he borrowed $2,500.00 from Mrs. Rita Banks in 1946 and that he repaid it in 1947. He also testified that he borrowed $4,500.00 from Thomas Banks in 1947 and repaid it in 1948.

Q. Are there any documents in evidence here to substantiate his testimony?

A. There are Exhibits 108, 109, and 112, which Mr. Wickers testified were funds that he used in repayments of these loans.

Q. Now with reference to line No. 17, can you explain that?

A. Mr. Schuettler orally testified that he borrowed $10,000.00 from Mr. Banks in 1944 and repaid it in 1945, which would leave a balance of $10,000.00 as of December 31, 1944.

Q. Now with reference to line 18 on Government's Exhibit 225, can you explain that, please?

A. Information for this would come from Government's Exhibits 77, 78, and 79.

(Exhibits handed to the witness.)

Q. And what figures did you arrive at there and what do they represent?

A. Government's Exhibit No. 79 shows that Mr. Halvorson received a $1,400.00 loan from Tom Banks in September of 1943. It also states that it would be repaid in payments

of $25.00 per month. Mr. Halvorson orally testified that he made payments of $25.00 per month and that they were deposited in the Grand Marais State Bank account. In 1943 there were $75.00 deposited in this account, which reduced the $1,400.00 loan to $1,325.00. In 1944 there were twelve deposits of $25.00 for a total of $300.00, which, subtracted from the $1,325.00, leaves a balance of $1,025.00 as of December 31, 1944. In 1945 there were twelve deposits of $25.00 for a total of $300.00, which reduced this loan to $725.00 as of December 31, 1945.

In 1946 there were a couple of $50.00 deposits, one $75.00 deposit, and a number of $25.00 deposits, which totaled $325.00, which reduced the loan to $400.00. In 1947 there were two $25.00 deposits and one $50.00 deposit and one $100.00 deposit, which reduced the loan to $200.00.

Q. Line 19, can you explain that?

A. Information for line 19 comes from Government Exhibit No. 222. This exhibit is T. W. Banks' account in Brady's Bar, Inc., — account in the general ledger. It has a debit balance of $6,934.42, which indicates that Mr. Banks owed the corporation that amount as of December 31, 1941, and that is carried as a red figure up there. As of December 31, 1942, the corporation carried a debit balance of $7,434.42, which indicates that Mr. Banks owed that money to the corporation, and it is set up as a red figure on that chart.

As of December 31, 1943, the corporation shows a credit balance of $9,240.10, which indicates that the corporation owed Mr. Banks that money, and which is set up as a black figure as a receivable.

Q. Now, line 20, Pearson's News Service.

A. Information for this line is contained in Government's 197, 198, and 200, and in a stipulation as to these balances.

Mr. Graff: I supposed the stipulation went only to the foundation.

Q. (By Mr. Lord.) The books that are in evidence shows those balances, do they not, and the other set of pages

that were included as a part of those books? Is that what you meant by stipulation?

(Document handed to the witness.)

Q. If there are other exhibits, you feel free to ask for them, Mr. Kleven.

A. Exhibit No. 200 shows a negative balance as of December 31, 1941 in the amount of $998.15. It also shows as of December 31, 1942 a negative balance of $438.00. It shows a positive balance of $1,610.00 as of December 31, 1943. It shows a positive balance of $410.00 as of December 31, 1944. It shows no balance for the end of 1945. It shows no balance at the end of 1946. It shows a positive balance—Exhibit No. 197-A shows a positive balance of $200.00 on December 31, 1947.

Q. Now, with reference to line 21, can you explain that?

A. Those figures were obtained from Government's Exhibits Nos. 152, 153, and the oral testimony read into the record by George McKusick.

(Exhibit handed to the witness.)

A. (Continuing.) It consists of a total of three accounts in that book.

Q. And which book do you refer to?

A. The general ledger of the Blue Goose, Rita L. Banks, Notes Payable — Rita Banks, and Officers' advances; the figures read into the record by Mr. McKusick. On December 31, 1942, negative balance, $2,420.00; December 31, 1943, positive balance, $10,469.45; December 31, 1944, positive balance, $16,514.82; December 31, 1945, positive balance, $9,477.02; December 31, 1946, negative balance, $1,488.13; December 31, 1947, a positive balance of $511.87.

Q. Now, with reference to line 22, McCarthy's Cafe, Mr. Kleven.

A. That information comes from Government Exhibit No. 159, which is explained by a transcript of Mr. McKusick's, Government Exhibit No. 221.

(Exhibit handed to the witness.)

A. (Continuing.) Government Exhibit No. 221 shows a balance as of December 31, 1944 or $3,500.00; as of December 31, 1946, a balance of $13,500.00; and as of December 31, 1947, of $38,500.00, of which McKusick said $12,500 was Mr. Shepard's, leaving a balance of $26,000.00 as of December 31, 1947.

Q. Now, with reference to line 23, the Flour City Body Corporation, will you explain that line?

A. Information on that line is contained in Government's Exhibits 148 and 149.

(Exhibits handed to the witness.)

A. (Continuing.) Government Exhibit 149-D, notes payable, Flour City Body books, — an entry dated August 31, 1944, "T.W." and "A.M." — $10,000.00; August 31st, "T.W." and "A.M.," $4,000.00; August 31, 1944, "T.W." and "A.M.," $9,000.00, leaving a balance of $5,000.00, which is divided equally between Mr. Banks and Mr. Cary, leaving a balance of $2,500.00 as of December 31, 1944.

Mr. Lord: Counsel, I suppose you can appreciate it is hard to add these figures with someone looking over your shoulder. You will have a chance on cross-examination. He will have a chance on cross-examination, I believe, to question his figures, will he not, Your Honor?

The Court: Have you the exhibit, counsel?

Mr. Graff: No, I don't have the exhibit. I just wanted to make sure whether the witness was reading from the book or whether he was reading from his notes. I find he is reading from his notes.

Q. (By Mr. Lord.) Mr. Kleven, from what were you reading as counsel stood there?

A. I read those figures from the books.

Mr. Graff: Do you have your notes there, Mr. Kleven?

The Witness: I have my notes here.

Q. (By Mr. Lord.) What are you using your notes for?

A. For reference.

Q. To guide you through this? A. Yes.

The Court: The data you gave came from the books and records of these various concerns?

The Witness: The entries I read came from the books. My interpretation of the 50 per cent is my interpretation of the "T.W." and "A.M."

The Court: That is for each of these parties—the share of each of the parties?

The Witness: Yes.

Mr. Hoffmann: If the Court please, we ask that that testimony go out because as the foundation for this witness' testimony with respect to 224 and 225, it was by the witness stated that the charts were prepared by him, based upon the exhibits, and the testimony, and now it appears that another element has entered into his testimony and determination.

The Court: The motion to strike is overruled.

Q. (By Mr. Lord.) Mr. Kleven, have you then arrived at the numbers and given them to us here which you put on this exhibit? Were you giving the numbers? I wasn't watching the exhibit.

A. What is that, counsel?

Q. I say, were you, when Mr. Graff and I were both standing here beside you, giving us the numbers shown on that exhibit, or are you giving other numbers with which you arrived at it?

A. I read other numbers.

Q. I think you have stated that you have used the number shown in those books to arrive at the number shown on the chart, haven't you?

A. That is correct.

Q. Then I believe if you will give us the numbers on the chart that that will suffice and counsel can cross-examine

you as to what particular numbers you have used or didn't use.

A. Balances found from the excerpts from this account in these books showed a balance as of December 31, 1945 of $5,000.00 to a credit of Mr. Banks, and as of December 31, 1946, $2,750.00, and as of December 31, 1947, $2,750.00.

Q. Now, will you explain line 25, Mr. Kleven?

A. Line No. 25 is taken from Government's Exhibit 215 and the testimony of Mr. Weinstock. This check, No. 109, dated October 31, 1947, to Len Welsh in the amount of $5,000.00 was explained by Mr. Weinstock not to have been paid so far as he knew by the end of 1947, and therefore it has been set as an asset as of Decembr 31, 1947, in the amount of $5,000.00.

Q. Now, have you totalled the various receivables with which you have charged the defendant here on this chart?

A. Yes, I have.

Q. And will you tell me the year-ending totals, if you please?

A. As of December 31, 1941, there is a negative balance of $7,932.57; as of December 31, 1942, there is a negative balance of $10,292.42; as of December 31, 1943, a receivable balance of $22,644.55; as of December 31, 1944, there is a balance, total receivables, of $46,449.82; as of December 31, 1945, there is a total receivables of $42,452.02; as of December 31, 1946, there is a total receivables of $41,411.87; and as of December 31, 1947, there are total receivables of $67,911.87.

Proceedings had in the foregoing entitled matter before the Honorable Robert C. Bell on May 28, 1952. Appearances are as has been heretofore noted.

(The following proceedings were had in the Court's Chambers:)

Mr. Graff: May the record show that this is out of the hearing of the jury, Your Honor?

The Court: Very well.

Mr. Graff: At this time we move to strike from Exhibit 224 on the last page thereof all the items reading from the bottom as follows: "Unreported Income, Net Income per return, and Corrected Net Income," on the ground and for the reason that the characterization in Exhibit 224 of these items invades the province of the jury in finding as a fact that there was certain unreported income in each one of those years.

Now, with particular reference to the years other than the years involved in the Indictment, that is the years '45, '46, '47, we further object to those figures being on Exhibit 224—by those figures, I mean "Correct Net Income, Net Income per return, and Unreported Income,"—for the reason and on the ground that the figures as stated therein are purely the conclusions of the individual who prepared this, and would serve no purpose other than to prejudice and create passion and feeling on the part of this jury.

With respect to the so-called item labeled "Unreported Income," for the years '45, '46 and '47, that is one of the very things that the jury is to determine and they propose, as we view it, by this Exhibit to take from the jury that right and thereby the province of the jury is invaded with respect to fact matters. Of course, the same objection goes to Exhibit 225, and we respectfully move that those portions be eliminated from Exhibit 224 and Exhibit 225.

The Court: Is that agreeable to counsel for the Government?

Mr. Landrum: Mr. Lord will answer it and then, if the Court please, if I might be permitted to say a word after he has concluded. I would like to step out and get my brief bag if I might while he is talking, because I think I have got a couple of citations in there, and I do not know whether Mr. Lord has them or not.

Mr. Lord: If the Court please, the witness who has prepared this chart has testified, and I believe, has laid sufficient foundation for his qualification as an expert witness. He is a certified public accountant, and has had six years of investigation of income tax fraud cases, together with other education and experience. Now, necessarily someone must form a conclusion to help guide this jury and the expert witness who has drawn that chart has assimilated the evidence and has shown as an expert his interpretation of that testimony and it has resulted in the figures which are shown on that chart. It is submitted that the complexities of the case are such as require interpretation by an expert in order to aid the jury in assimilating the evidence that has been presented.

Now, as to the years prior to 1945, '46, and '47, the cases hold that even though they might prove,—even though in the course of proving the offenses which we here charge, it might be necessary to prove other offenses which are the offenses which would be shown by the large amounts of unreported income and the small amount of reported income in the years '42, '43 and '44. They go to the question of intent and wilfulness and the cases hold that it is permissible to prove other crimes even if it is only for the purpose of proving intent and wilfulness in the crimes which we are charging the defendant with here. And there is another reason for showing the large amounts of unreported income in the years previous to the prosecution years. Those reasons are inherent in the use of the net worth system, where we attempt insofar as possible to show what the man's net worth was and what his income was every year from the starting point up until the period for which he has been indicted and it is submitted, although I do not have the cases at my fingertip, that such charts have been admitted in many other cases when such previous conduct as to unreported income has been admitted in evidence in tax cases of this type.

Mr. Landrum: If the Court please, I did not hear the first part of Mr. Lord's statement, but I desire to say to Your Honor that it is my opinion that the first proposition announced by Counsel is conclusively against him in the United States vs. Miller, a case in the Second Circuit, 61 Fed. 2nd, at 947. The second is a case which holds the same thing, namely, that the prosecution's accountants were allowed to present calculations, and that is exactly what was held in the Miller case, and it was also held in a case decided by Your Honor—not quite as clear as in the Miller case—but in the Gleckman case, which is reported in 80 Fed. 2nd, at 394, the same procedure was followed and the calculations were permitted in evidence. With relation to the second question, that is, setting up the other years, that has been decided many times,—there are many, many, cases, if Your Honor please, holding that it is entirely proper to set up the situation as it existed through the period, even though in setting it up there were other offenses,—not for the purpose of showing those offenses, but for the purpose of showing the general situation.

I desire to say to Your Honor that insofar as setting up those other years is concerned, I desire to say that there just is not any question about it under the law. I tried to find those particular cases, but it has been done many times, and I find no case that holds that that is not proper.

Mr. Graff: If the Court please, I am not familiar with the Miller case but I have read the Gleckman case and that is essentially, as I recall it, a bank deposits case which I think was tried the second time before Your Honor.

Now, I remember nothing in the Gleckman case that authorizes an expert witness to invade the province of the jury. This other rule that both counsel talked about that something is not objectionable because it happens to prove other crimes is not the situation that we have here. The situation that I think they are getting to is this: If, for

example, that you are proving, if you are trying an individual for, shall we say, murder, and as a part of the murder charge you prove that the individual robbed somebody, and the fact that you might happen to prove him guilty of robbery is not objectionable because it is part of the circumstances going to the proof of murder. There is nothing in that situation, Your Honor, and there is nothing in the so-called net worth idea that permits you or anybody to come up and say, "All right, it is my conclusion that in 1941 this man had an unreported income of $22,604.96."

That is an invasion of the province of the jury. That is a conclusion of this witness. That is for the jury to determine.

Mr. Landrum: Now, the cases, if Your Honor please, on that first question are United States vs. Chapman.

Mr. Kyle: First point, Mr. Landrum?

Mr. Landrum: United States vs. Chapman, 168 Fed. 2nd, 997; United States vs. Schuerman, 174 Fed. 2nd, at 397; United States vs. Potson, 171 Fed. 2nd at 495; and the Gleckman case, which I have heretofore cited, 80 Fed. 2nd, at 394.

Mr. Lord: I have even more and some quotations from the cases if Your Honor would care to hear them.

The Court: No, I am familiar with most of these cases. I know what they hold—I think I do.

Mr. Hoffmann: May I add just one thing, Your Honor?

The Court: Yes.

Mr. Hoffmann: With reference to the last three figures on the last sheet of the proposed Exhibits 224 and 225, to-wit, Unreported Income, 1945, $23,520.00; Unreported Income, $9.698.98, 1946; Unreported Income, 1947, $20,843.78, —we submit that it is so flagrantly obvious that those figures represent a characterization of the testimony, a conclusion drawn from the testimony, a conclusion, if you

please, sir, established by Mr. Kleven's testimony drawn from something that he got outside of the evidence and outside of the exhibits, and is a pretended determination of the very crux, and an invasion of the province of the jury to that extent, in this case.

The Court: Such evidence as this has been admitted in many cases in the last several years,—I mean, tax evasion cases,—very similar evidence, very similar statements. The same objection was made that is now made in this case, that is, that the exhibits showed conclusions and in many instances were inaccurate, invaded the province of the jury, but I do not know of any case that has been reversed for those reasons. Now, this witness is placed on the witness stand and Exhibits 224 and 225 are being used to summarize the evidence that is supposed to be in these exhibits. I am not sure it is all in the exhibits, but this witness seems to think so and I think if it is not in the evidence, counsel for the defendant will point out wherein the record is defective in any respect and show to the contrary.

This jury, however competent it may be as a jury, is not able to make the calculations that it is necessary to ascertain from the charts in this case. It takes an expert to do it, on either side, and that is the reason why courts generally are in favor of having somebody who knows something about bookkeeping and accountancy appear and explain these various things to a jury. Now, you may call it invading the province of the jury if you want to, but the jury needs the assistance of an accountant to tell them what is in a complicated lot of books—books of many concerns—because it is impossible for them to get the facts without that sort of assistance. So the motion is overruled.

Mr. Graff: Now, if the Court please, in order that we may not interrupt any more than is necessary, may we then have an objection running to all of Mr. Kleven's testimony pertaining to Exhibits 224 and 225 on the grounds that have

heretofore been stated to the Court, and on the further ground that if he is testifying as an expert, that there has not been sufficient foundation laid for him to express an opinion.

The Court: Very well. I think you are entitled to that objection.

(Thereupon the following proceedings were had in open court:)

The Court: You may proceed.

Whereupon, GERALD O. KLEVEN, resumed the stand and testified as follows:

Direct Examination (Continued)

By Mr. Lord:

Q. Mr. Kleven, directing your attention to the third page of Government's Exhibit 225 and line 27 thereon, would you explain that line, please?

A. That represents stock in Merchants Distilling Corporation and that was found in Government's Exhibits 11, 83 and 87,—the balance on hand of that stock as of December 31, 1946, $9,380.91.

Q. Now, would you in as short a time as possible explain to us just how you arrived at that figure?

A. There was a purchase dated May 14, '46, of 300 shares in Merchants Distilling, $4,820.19, and the subsequent purchase, June 3, 1946 for $960.00.

Q. And what exhibits are they shown in?

A. That is Exhibit 87.

Q. Is that the record of Jamieson & Company?

A. That is the record of Jamieson & Company, account of Mrs. Rita L. Banks, and Government's Exhibit 83 shows the sale of this stock on July 11, 1947. Therefore, it was on hand as of December 31, 1946.

Q. You made reference to Government's Exhibit 11. That appears to be the income tax return of T. W. Banks for the year 1947. Will you tell me where these stocks appear on that income tax return, if at all?

A. Those stocks are reported as "sold" in Mr. Banks' return for 1947.

Q. Now, with reference to Line No. 28, Mr. Kleven, will you tell me where you got those figures?

A. That came from Government's Exhibit 85.

Q. What is Government's Exhibit 85?

A. That is the stock brokerage ledger account from Jamieson & Company in the name of Thomas W. Banks and Mrs. Rita Banks. It shows the purchase of 400 shares of Gillette Safety Razor Company stock in the amount of $14,349.04, and it shows a cash receipt on January 5th of $1,075.49. January 6th is the settlement date for the purchase of this stock, but December 31, 1947, was the trading day and we have subtracted this cash payment from the total cost of the stock and which is the actual proceeds from the sale of Northwest Airlines stock on the same date of $13,273.55.

Mr. Graff: Just a moment. I understand now that you are relating this from Exhibit 85?

The Witness: Yes.

A. (Continuing) The balance from the proceeds of the investment of this stock as of January 31, 1947, $13,273.55.

Q. (By Mr. Lord) Mr. Kleven, will you explain line No. 29?

A. That is stock in the Northwest Airlines, Incorporated, and the information on this is obtained from Government's Exhibits 116, 117, 84, 85 and 11. The total investment of this stock as of December 31, 1945, is $22,019.29. The total amount of this investment as of December 31, 1946, is $28,957.29.

Q. Mr. Kleven, will you explain line No. 30?

A. The information for that stock was obtained from Government's Exhibit No. 10 and Government's Exhibit No. 33, and the balance of this stock as of December 31, 1941, was $750.00; December 31, 1942, $750.00; December 31, 1943, $750.00; balance December 31, 1944, $750.00; December 31, 1945, $750.00.

Q. What accounts for the fact that you do not carry a balance here then?

A. That was sold in 1936.

Q. Now, will you explain line No. 31, if you please?

A. Line No. 31, that is Insull Utilities bonds. The information for that was obtained in Exhibit 33, which indicates a zero—as worthless. Actually that stock had a cost basis of $3497.40.

Q. I note that you do not carry that stock in 1941. Can you explain the reason for that?

A. That was sold in 1939 as shown in Government's Exhibit 33.

Q. Now, can you explain line 32?

A. That also came from Government's Exhibit 33 which gave this a market value of $420.00. From other information that was shown to have a cost of $2819.53 as of December 31, 1936, in 1941, '42, '43, '44, '45, '46 and '47.

Q. Now, Mr. Kleven, will you explain line No. 33?

A. That is Banks and Shepard partnership. Information on that is contained in Government's Exhibits 218, 219, 24, 25, 26 and 27. The balance as of December 31, 1941, is $4,679.77; balance as of December 31, 1942, $6,796.96; balance as of December 31, 1943, $8,677.83; December 31, 1944, $7,884.56; December 31, 1945, $9,258.95; December 31, 1946, $8,219.03; and December 31, 1947, $9,038.14.

Q. Can you explain line 34, Mr. Kleven?

A. That is a partnership investment in Coin-A-Matic Amusement Company. The information on that is contained in Government's Exhibits 220 and 28 and 31.

The balance as of December 31, 1941, $5,192.26; December 31, 1942, $4,156.46; December 31, 1943, $6,140.77; December 31, 1944, $6,894.85; December 31, 1945, $8,058.53; December 31, 1946, $8,862.45; December 31, 1947, $7,505.72.

Q. Can you explain line 35, please?

Mr. Graff: May the record show, Your Honor, that the witness is testifying from notes that he has before him and is not using the exhibits to testify from.

Mr. Lord: We would abide by the Court's decision in that matter. If you would like us to go into each exhibit and pull the numbers out and take the time requisite to do that, we will do it. Otherwise—

The Court: (Interposing) Well, as there is an objection, I think that should be done.

Mr. Lord: We will be here a long time.

The Court: Very well.

Mr. Landrum: What line were you on, Mr. Lord?

Mr. Lord: 35.

Mr. Landrum: Please go ahead with it and then proceed with the exhibits.

Q. (By Mr. Lord) What exhibits were you using with reference to line 35?

Mr. Hoffmann: Your Honor, I think perhaps counsel, and through counsel the Court, misunderstood Mr. Graff's statement. As I understand this witness' testimony, what he purports to testify from now, he claims and states is his interpretation of these exhibits—

Mr. Landrum: (Interposing) No, he is testifying from a memorandum that he is using to refresh his recollection.

Mr. Lord: And he has stated the source of the information and the source of his figures are the exhibits which he

took. Now, he does not purport to be reading each exhibit, but will gladly do that if he thinks we should.

Mr. Hoffmann: If counsel will listen me out, I am sure the Court will appreciate what I am going to say. We understand the witness is now testifying from something that he prepared as he claims from the exhibits, is that correct?

Mr. Lord: He is testifying as to what he found in the exhibits. He has a memorandum in his hand to help to guide him through the exhibits, from which he drew that information.

Mr. Hoffmann: With that understanding, Your Honor, as to what he is testifying from,—Mr. Graff's purpose is that the record show what he is testifying from.

The Court: Well, he is using a memorandum that he has prepared to aid his memory of what he found in the exhibits. That is my understanding.

Mr. Landrum: That is correct.

Mr. Hoffmann: With that understanding, Your Honor, we simply wanted the record to show that fact, not that we seek to drive him back into these books and thereby prolong the trial.

The Court: Very well. That is agreeable. All right.

(To the witness) You may explain 35.

A. Line No. 35—

The Court: What are the exhibits on which you relied?

The Witness: Exhibits No. 160 and 221. The balance as of December 31, 1942 was $7,364.14; December 31, 1943, $11,864.14; December 31, 1944, $11,864.14; December 31, 1945, $11,864.14; December 31, 1946, $11,864.14; December 31, 1947, $11,864.14.

Q. (By Mr. Lord) Now, will you explain line 36?

A. That is the investment in the B & S Company, a corporation. The information on this asset comes from Exhibits No. 70 and 71, Exhibit No. 223, and my testimony of yesterday.

Mr. Hoffmann: Whose testimony of yesterday?

Mr. Landrum: Answer him.

The Witness: I testified on this company yesterday.

Mr. Landrum: Yes, I know; he asked you whose testimony.

The Witness: Pardon?

Mr. Landrum: He asked you to state whose testimony.

The Witness: Mr. Kleven's testimony.

Mr. Graff: In other words, your own testimony?

The Witness: Yes.

A. (Continuing) The balance as of December 31, 1943, is $3,400.00; as of December 31, 1944, $8,849.33; December 31, 1945, $8,849.33; December 31, 1946, $8,849.33; and December 31, 1945, $8,849.33.

Q. (By Mr. Lord) Now, will you explain line No. 37?

A. The information on this is the investment in capital stock in the Flour City Body Corporation, and the exhibits for this are Government's Exhibits No. 146, 147, and 33. The balance as of December 31, 1936 is $4,000.00; December 31, '41, '42, '43, '44, '45, '46 and '47, is $4,000.00.

Q. Now, would you explain Government's—correction, will you explain line 38?

A. This is capital stock investment in the Power Brake and Equipment Company, and Government's Exhibits 110 and 111. The balance as of December 31, 1946, $3,750.00, and December 31, 1947, $3,750.00.

Q. Now, will you explain line No. 39?

A. This is capital stock in investment in the Blue Goose Resort, Inc. Exhibits 150, 151, and the testimony of Mr. McKusick. The balance as of December 31, 1941, $7,125.00, and '42, '43, '44, '45, '46, and '47, as of December 31st of each year is $7,125.00.

Q. Would you explain line No. 40, Mr. Kleven?

A. That is stock and investment in the Wheel Service Company. The information for that is contained in Government's Exhibit No. 33—$4500.00 as of December 31, 1936.

Q. I note you do not carry that balance throughout. Can you explain that?

A. That was subsequently sold, as reported in Government's Exhibit No. 4.

Q. What is that, an income tax return? A. Yes.

Q. Now, would you explain line 41?

A. That is a partnership investment in the 10th Street Realty Company. Information obtained from Government's Exhibits No. 22, 100, 101, 102, and Mr. Kleven's testimony.

Mr. Graff: That is your own testimony?

The Witness: Right.

A. (Continuing) The balance as of December 31, 1946, $9,925.00 and December 31, 1947, $14,603.00.

Q. (By Mr. Lord) Will you explain line 42?

A. This is an investment in Casablanca, Incorporated. The information was contained in Government's Exhibit's No. 70, 71, and the testimony of Mr. Weinstock. Balance as of December 31, 1943, $7,800.00; as of December 31, 1944, $7,800.00; as of December 31, 1945, $7,800.00; as of December 31, 1946, $7,800.00; and as of December 31, 1947, $7,800.00.

Q. Will you explain line 43?

A. That is an investment in the Budweiser Tavern Building and the information on that is contained in question and answer statement, Government's Exhibits No. 70 and 71. Investment as of December 31, 1942, $3,071.50, and December 31, 1943, 1944, 1945, 1946, and 1947, is also $3,071.50.

Q. Will you explain line 44?

A. This is the investment account in the Pearson News Service. Information on this line is contained by stipulation in Government's Exhibits 196 and 199, and information is also contained in the tax return for 1947, Government's Exhibit No. 11. The balance as of December 31, 1941, $2,948.56; the balance as of December 31, 1942, $6,043.81; balance as of December 31, 1943, $2,951.67; balance as of December 31, 1944, $5,200.79; balance as of December 31, 1945, $11,408.01; December 31, 1946, $24,667.35; December 31, 1947, $5,765.24.

Q. Would you explain No. 45?

A. The information on this stock investment is contained in Government's Exhibit No. 214. The balance as of December 31, 1943, '44, '45, '46, and '47, was $1,775.00.

Q. Line No. 46?

A. This represents investment in the Koolaire, Inc. Information on this investment is contained in Government's Exhibits 182, 183, 173, 174, 175, 176 through 181, inclusive, 184-A and 184-B, and the testimony of Mr. Freedland. The balance as of December 31, 1947 is $18,200.00.

Q. Line 47.

A. This represents stock in National Plastics, and Banks, Cary, Shepard, and Bortz partnership, and the information on this is contained in Government's Exhibits 11, the 1947 tax return and the partnership return, Government's Exhibit 32, and the question and answer statement, Government's Exhibits 70 and 71. The balance as of December 31, 1944, $6,250.00; December 31, 1945, $8,125.00; and December 31, 1946, $8,125.00.

Q. Mr. Kleven, I neglected to ask you with reference to investments in marketable stocks and bonds, what you found as being the total investments in those stocks and bonds on the top portion of the third page of Government's Exhibit 225. Will you tell we what those totals were?

A. The totals of marketable stocks and bonds as of December 31, 1936, $6,316.93; December 31, 1941, $3,569.53; as of December 31, 1942, $3,563.53; December 31, 1943, $3,569.53; December 31, 1944, $3,569.53; December 31, 1945, $25,588.82; December 31, 1946, $41,157.73; and December 31, 1947, $16,093.08.

Q. Now, did you add the total investments in operating companies on page 3 of Government's Exhibit 225?

A. Yes, I did.

Q. And what were your totals?

The total investments in operating companies as of December 31, 1936, $8,500.00; December 31, 1941, $25,720.68; December 31, 1942, $40,332.87; December 31, 1943, $56,805.91; December 31, 1944, $70,715.17; December 31, 1945, $81,335.46; December 31, 1946, $108,033.80; December 31, 1947, $103,347.07.

Q. Now, have you added the total of investments in operating companies and investments in marketable stocks and bonds?

A. Yes, I have.

Q. Is that Government's Exhibit 225, the third page?

A. Yes.

Q. What are your figures?

A. Total Investments as of December 31, 1936, $14,816.93; December 31, 1941, $29,290.21; December 31, 1942, $43,902.40; December 31, 1943, $60,375.44; December 31, 1944, $74,284.70; December 31, 1945, $106,924.28; December 31, 1946, $149,191.53; December 31, 1947, $119,440.15.

Q. Now, turning to page 4 of Government's Exhibit 225, I note that you have real estate and other property, and the heading "Anoka Farms." Will you tell me what line 48 under the heading means?

A. That is the Inventory as shown per tax returns.

Q. Whose tax returns?

A. Mr. Banks' returns.

Q. What exhibit numbers are they?

A. Those are shown on Government's Exhibits 6, 7, 8, 9, 10 and 11. The Inventory as of December 31, 1941, is $745.00; December 31, 1942, $9,128.32; December 31, 1943, $12,692.10; December 31, 1944, $16,922.01; December 31, 1945, $16,284.25; December 31, 1946, $16,389.50; December 31, 1947, $20,907.01.

Q. Can you explain line No. 49, Mr. Kleven?

A. Those are the farm buildings and improvements on the main farm, and they are shown in Mr. Banks' income tax returns, Government's Exhibits 6, 7, 8, 9, 10 and 11. The balance as of December 31, 1941, $6,400.00; December 31, 1942, $17,176.36; December 31, 1943, $19,726.36; December 31, 1944, $21,497.27; the balance as of December 31, 1945, $22,750.19; the balance as of December 31, 1946, $24,840.75; December 31, 1947, $24,974.60.

Q. Can you explain line No. 50?

A. That is farm equipment on the main farm and those are also contained in the income tax returns, Government's Exhibits 6, 7, 8, 9, 10 and 11. The balance as of December 31, 1942, $9,259.75; December 31, 1943, $9,259.75; December 31, 1944, $11,715.71; December 31, 1945, $11,715.15; December 31, 1946, $16,848.12; December 31, 1947, $19,764.60.

Q. You have $18,000.00 on the chart here, Mr. Kleven. Which is correct?

A. $18,764.60.

Q. How do you account for that? Did you just make a mistake in reading that?

A. Yes.

Mr. Hoffmann: As a matter of fact, Mr. Witness, you just changed the entry on the thing you were reading from, did you not?

The Witness: I have made an error in addition—

Mr. Hoffmann: (Interposing.) The simple question is you just changed the thing you were reading from, did you not?

The Witness: I did.

Mr. Landrum: All right, go ahead.

The Witness: I changed the total. I did not change the entries that make up that total.

Q. (By Mr. Lord.) Did you now re-check your addition?

A. Yes.

Q. I believe we are on line 52, are we not?

A. 51.

Q. Will you explain that line?

A. That is the farm land on the main farm. The information for this line is contained in the testimony of Mr. Brancheau, Government's Exhibits 43, 37, 38, 42, 41, 40, 39, 202, and Government's Exhibit No. 5. The balance as of December 31, 1941, $3,830.35; December 31, 1942, $3,830.35; December 31, 1943, $5,130.35; December 31, 1944, $5,130.35; December 31, 1945, $5,130.35; December 31, 1946, $9,880.35; December 31, 1947, $9,880.35.

Q. Now, line 52, Mr. Kleven, will you explain that, please?

A. That line consists of the buildings on what is called in the tax return as Farm No. 2, — buildings and improvements. The information for that line is contained in Government's Exhibits 9, 10, and 11. The balance as of December 31, 1945, is $2,000.00; December 31, 1946, $2,218.59; December 31, 1947, $4,599.47.

Line 53 is the land for Farm No. 2. The information concerning the value and cost of that land is obtained from Government's Exhibits 9, 10, and 11. The balance as of December 31, 1945, is $3,200.00; December 31, 1946, $3,365.00; December 31, 1947, $3,365.00.

Q. Line 54.

A. That line consists of the buildings on what is known as Farm No. 3. The information on it for those buildings is contained in Government's Exhibit 11, and as of December 31, 1946, the cost was $1800.00; December 31, 1947, $1800.00.

Q. Now, with reference to line 55.

A. That is the land on Farm No. 3. Information concerning the cost of that land is contained in Government's Exhibit No. 11. The cost as of December 31, 1946, $3,240.00; December 31, 1947, $3,240.00.

Q. Now, line 56, Mr. Kleven.

A. That item represents stock in the Twin City Milk Producers Association, and the information on the cost of this asset is contained in Government's Exhibit 113. The balance—the cost as of December 31, 1942, was $110.00; December 31, 1943, the cost was $165.00; 1944, '45, '46, and '47, as of December 31st of each year, the cost was $165.00.

Q. Now, line 57, "Mortgages on Farms," can you explain that?

A. The information concerning Mortgages on Farms is contained in Government's Exhibits 106, 107, 166, 167, and 168. The balance on these mortgages as of December 31, 1941, was $4,394.75; as of December 31, 1942, $4,230.46; as of December 31, 1943, the balance is $4,059.53; no balance as of December 31, 1944, and December 31, 1945; the balance as of December 31, 1946, $1,072.18; and as of December 31, 1947, $990.15.

Q. Now, Line 58, Reserve for Depreciation, Buildings and Equipment,—can you explain that line?

A. That line is the reserve for depreciation on all buildings and properties on all of the Anoka Farms.

Q. Where did you get the information from which you computed that reserve for depreciation?

A. That information is contained in Government's Exhibits 6, 7, 8, 9, 10, and 11, the income tax returns. The balance as of December 31, 1941, $532.00; December 31, 1942, $1,951.86; December 31, 1943, $3,422.72; December 31, 1944, $5,102.79; December 31, 1945, $7,016.28; December 31, 1946, $9,081.25; and December 31, 1947, $12,235.14.

Q. How did you arrive at the figures under "Total Farm Investment"? Will you explain the figures under that?

A. I added up the black figures and added up the red figures and subtracted the red figures from the black figures to obtain a net total farm investment.

Q. By the red figures you mean the mortgages on farms in line 57 and the reserve for depreciation in line 58, is that correct?

A. That is correct.

Q. What balances did you arrive at?

A. Total farm investment as of December 31, 1941, $6,048.60; December 31, 1942, $33,322.46; December 31, 1943, $39,491.31; December 31, 1944, $50,327.55; December 31, 1945, $54,230.22; December 31, 1946, $68,593.88; December 31, 1947, $74,471.01.

Q. Now, I see that the next line is "Other Property", and under that line 59. Can you explain that?

A. That is personal residence located at 3817 Drew Avenue, and the information on that asset is contained in Government's Exhibits 33, 53, and the testimony of Hazel Aarhus, and the cost of that asset as of December 31, 1936, 1941, 1942, 1943, 1944, 1945, 1946, and 1947, is $11,500.00.

Q. Line 60, which has "3952 Beard Avenue," can you explain that? What property is that, which is in evidence here?

A. The information on that property is contained in Government's Exhibit No. 33, 55, 54, 206, and Government's Exhibits 1 through 8, inclusive. The cost basis of this property as of December 31, 1936 was $6,402.50; as of December 31, 1941, the cost basis $5,705.62; December 31, 1942, adjusted cost basis of $5,524.27; and as of December 31, 1943, the adjusted cost basis of $5,343.12.

Q. Will you explain, if you can, why you say the cost basis diminishes?

A. That is due to reductions by depreciation.

Q. Well now, departing here, I think I would like to have you explain, if you can, in taking what you call cost value, without reference to the chart, but in an ordinary net worth case, taking cost value—if a certain investment is made in

the house and then the market value of that house goes up, how do you carry that on your net worth analysis?

A. Are you referring to a personal residence?

Q. Yes.

A. It would be at the purchase price or cost basis.

Q. And would you pay any attention to the increase in market value of that house in the event that the market value went up?

A. No, that would have no effect under this kind of a determination.

Q. Did you depreciate line 59? A. No.

Q. Why not?

A. Because that is his personal residence and is not subject to depreciation.

Q. Then why did you depreciate line 60 as you say you did?

A. That is rental property and is subject to depreciation.

Q. (By Mr. Lord.) Now, will you go on to Line 61?

A. The information on this asset is contained in Government's Exhibits 46, 162, 163 and the testimony of Mr. Horn.

Q. Now, will you go on to line 62 and explain that?

A. The balance as of December 31, 1941, 1942, 1943, 1944, 1945, 1946 and 1947, was $2,100.00.

Q. Now, those balances you were referring to on line 61 which I omitted, and jumped ahead, is that correct?

A. That is right.

Q. Now, we will go on to line 62, if you please.

A. The information concerning the cost basis of this property is contained in Government's Exhibits 211, 164, 57, 56, 58, 204 and Government's Exhibits 6, 7, 8, and 9. The balance as of December 31, 1941, is $2,380.22; as of December 31, 1942, adjusted cost basis, $10,724.03; December 31, 1943, adjusted cost basis, $10,369.15; December 31, 1944, $10,696.87; December 31, 1945, $1,000.00; December 31, 1946, $1,000.00; December 31, 1947, $1,000.00.

Q. Can you explain the difference between the $10,696.87 and the $1,000.00 which you carried the next year?

A. That $1,000.00 represents the cost of one lot which was not sold with the house, when the house was sold in 1945.

Q. Mr. Kleven, will you explain line No. 63?

A. The information concerning the cost of the Oneida Building is contained in Government's Exhibits 188, 189, 213, 207, 47, 193, 188 to 192, inclusive, and Government's Exhibits 9, 10 and 11.

The cost basis as of December 31, 1944, $19,650.00; December 31, 1945, $20,862.17; December 31, 1946, $20,422.62; December 31, 1947, $32,358.33.

Q. Now, without going into all the details, Mr. Kleven, can you explain the difference between the 1946 figure of approximately $20,000.00 and the $32,000.00 which you carry in the '47 column?

A. Well, the building was actually sold in 1947 and the $32,000.00 figure represents the balance receivable on a contract for deed on the sale of that property.

Q. Will you explain line No. 64?

A. Information on the cost of this property contained in Government's Exhibits 61, 62, 63, 64, 65, 66 and 67, and the adjusted cost basis of this property as of December 31, 1943, $295.12; December 31, 1944, $295.12; December 31, 1945, $296.12; December 31, 1946, $296.12; December 31, 1947, $296.12.

Q. Now, line 65, "Hungry Jack Lodge," — will you explain that line?

A. The cost of Hungry Jack Lodge is taken from Government's Exhibits Nos. 70 and 71, and is $3,600.00 as of December 31, 1941, 1942, 1943, 1944, 1945, 1946, and 1947.

Q. Have you added the total in the various years as to the property which you call "Other Property"?

A. Yes, I have. The total other property as of December 31, 1936, is $17,902.50; December 31, 1941, $25,285.84; December 31, 1942, $33,448.40; December 31, 1943, $33,207.39;

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December 31, 1944, $47,841.99; December 31, 1945, $39,358.83; December 31, 1946, $38,918.74; December 31, 1947, $50,854.45.

Q. Now, how did you arrive at the figure "Grand Total Real Estate and Other Property," the line which appears at the bottom of this page?

A. That is the total of the total farm investment, plus the total of other property. That is, as of December 31, 1936, $17,902.50; December 31, 1941, $31,334.44; December 31, 1942, $66,770.86; December 31, 1943, $72,698.70; December 31, 1944, $98,169.54; December 31, 1945, $93,589.05; December 31, 1946, $107,512.62; December 31, 1947, $125,325.46.

Q. Mr. Kleven, turning to the next page of Government's Exhibit 225, headed "Liabilities: Loans Payable," and underneath the heading "Mortgages Payable," line 66, — can you explain that line?

A. That covers the mortgage and contract for deed on 3817 Drew Avenue. The Government exhibits used in determining these balances are Government's Exhibits 33, 60, 53, and 59.

Q. What was the last one please?

A. 59. The balance as of December 31, 1936 is $7,500.00; December 31, 1941, $2,075.98; December 31, 1942, $2,066.73; December 31, 1943, $1,187.87.

Q. Now, line 67.

A. That is the mortgage on 3952 Beard Avenue South. Government's Exhibits 33, 114, and 115. Balance as of December 31, 1936, $3,500.00; December 31, 1941, $2,120.00; December 31, 1942, $1,640.00; December 31, 1943, $1,160.00.

Q. Line 68?

A. That is a mortgage on 4400 East Lake Street. Government's Exhibits Nos. 162 and 163, 48, 49, and the testimony of Mr. Horn. The balance as of December 31, 1941, 1942, 1943, and 1944, and 1945 is $1,700.00.

Q. Now, Mr. Kleven, with reference to the entire page here I note the letters are in black. They represent liabilities, however, is that correct?

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A. That is correct.

Q. In some places you have put the letters in red. Can you explain that fact?

A. Well, they are in red when they are an offset to an asset, — when you subtract them from an asset and obtain a net valuation, net cost. Here we are totalling up all the liabilities and will in the next chart subtract them from the total of all the other assets in the first four pages.

Q. Then the fact that they are all liabilities would be the fact which causes them to be black, is that correct?

A. Yes.

Q. Now, shall we go to line 69?

A. The mortgage on 5238 Excelsior Boulevard, — Government's Exhibit 165. The balance as of December 31, 1942, $5,939.09; December 31, 1943, $5,190.40.

Q. Now, line 70, the Oneida Building.

A. The mortgage on the Oneida Building, — see Government's Exhibits Nos. 99, 50, 51, and 52. The balance as of December 31, 1944, $6,000.00; December 31, 1945, $5,400.00; December 31, 1946, $4,800.00.

Q. Have you totalled the mortgages payable?

A. Yes, I have.

Q. What did you find to be the totals?

A. The total mortgages payable as of December 31, 1936, $11,000.00; December 31, 1941, $5,895.98; December 31, 1942, $11,345.82; December 31, 1943, $9,238.27; December 31, 1944, $7,700.00; December 31, 1945, $7,100.00; December 31, 1946, $4,800.00; no balance as of December 31, 1947.

Q. I notice under the next heading "Loans and Accounts Payable," you have line 71, "Penn. Mutual Life Insurance Company,"—can you explain that line?

A. That is a loan on a life insurance policy and is shown in Government's Exhibits 33 and 194. The balance as of December 31, 1936 is $1,500.00.

Q. And line 72, can you explain that?

A. That is a loan payable to Harold H. Banks, and the information is contained in Government's Exhibit No. 33

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and the testimony of Harold H. Banks. The balance as of December 31, 1936, is $2,000.00; December 31, 1941, 1942, and 1943, it is $2,000.00.

Q. What accounts for the fact that you don't carry any balance after 1943?

A. That loan was repaid in 1944.

Q. Now, with reference to line 73, the Marquette National Bank, can you explain that line?

A. Notes payable to Marquette National Bank contained in Government's Exhibit No. 75. The balance as of December 31, 1941, is $4,500.00; as of December 31, 1942, it was $3,500.00.

Q. Now, line 74, the "First National Bank, Anoka, Minnesota" — can you explain that line?

A. Notes payable to the First National Bank, Anoka, Minnesota, contained in Government's Exhibit 81, and it shows a balance as of December 31, 1942 of $1,000.00.

Q. Line 75, the "Flour City Body Corporation," — can you explain that line?

A. 75 is a group heading for several accounts in the Flour City Body listed as lines 76, 77, and 78. The first one —

Q. That is line 76 you are referring to now?

A. Yes.

Q. "Officers Advances per Corporate Records," — and that has reference to the Flour City Body Corporation, is that correct?

A. Yes.

Q. All right. Now, explain line 76, if you will.

A. The balances shown on this liability were contained in Government's Exhibits 148 and 149. The balance as of December 31, 1941, was $38.47; December 31, 1942, $2,968.58; December 31, 1943, $3,484.66; December 31, 1944, $3,484.66; December 31, 1945, $3,484.66; December 31, 1946, $2,284.66; and in 1947 is a red figure because he had more than repaid his liability, so that there was a balance due him from the corporation of $462.62 as of December 31, 1947.

Q. Now, with reference to line 77, "Accounts Receivable per Corporate Records," — that again is Flour City Body Corporation, is it not?

A. Yes. Accounts Receivable in the name of T. W. Banks, shown in Government's Exhibits Nos. 216, 216-A, 217 and 217-A. The balance as of December 31, 1941, $2,816.13; December 31, 1942, $424.58; December 31, 1943, $322.29; and no balance was shown in the books after that date.

Q. Now, with reference to line 78, "Notes Receivable per Corporate Records," — that is in the Flour City Body Corporation too, is it not?

A. Yes.

Q. Will you explain that line, please?

A. The information on this item of Notes Receivable of the Flour City Body Corporation per corporate records is contained in Government's Exhibits 148 and 149, and a note in the amount of $1,500.00 is a balance as of December 31, 1942, 1943, 1944, 1945, 1946, and 1947.

Q. Now, Mr. Kleven, have you totalled the "Total Loans and Accounts Payable"?

A. Yes. The total loans and accounts payable as of December 31, 1936 is $3,500.00; as of December 31, 1941, $9,354.60; as of December 31, 1942, $11,393.16; December 31, 1943, $7,306.95; December 31, 1944, $4,984.66; December 31, 1945, $4,984.66; December 31, 1946, $3,784.66; December 31, 1947, $1,037.38.

Q. Now, have you made a grand total including the amounts under "Total Mortgages Payable," and "Total Loans and Accounts Payable"?

A. Yes, I have.

Q. What are those totals?

A. The grand total of loans and mortgages payable as of December 31, 1936, is $14,500.00; as of December 31, 1941, $15,250.58; December 31, 1942, $22,738.98; as of December 31, 1943, $16,545.22; December 31, 1944, $12,684.66; December 31, 1945, $12,084.66; December 31, 1946, $8,574.66; December 31, 1947, $1,037.38.

Q. Now, you have stated, have you not, that these are all amounts which Mr. Banks owes other people?

A. Yes.

Q. And the red figure is the one figure on the page where somebody else owed him, is that correct?

A. That is right.

Q. Well then, the fact that the balances here diminish, what would that indicate with reference to a person's net worth?

A. That would mean an increase in net worth by a reduction of liabilities.

Q. Now, referring your attention to the last page of Government's Exhibit 225, it says, "Net Worth — Thomas W. Banks" and "Assets." Will you tell me where you got the figures which you used in "Cash and U. S. Government Bonds" in the first line there?

A. That is the grand total as shown on sheet No. 1 for each year as listed.

Q. Now, "Receivables,"—where do you get your figures which you place in the column after "Receivables"?

A. That is the grand total as shown on page No. 2 for each of the years as listed.

Q. And "Investments"?

A. That is the grand total of page No. 3 for each of the years as listed.

Q. "Real Estate and Other Property"?

A. That is the grand total of page No. 4 for each of the years as listed.

Q. And do they all represent "Assets," — those four named items?

A. Yes, they do.

Q. Have you made a total of the amounts which were charged as assets on those other four grand totals?

A. Yes, I have.

Q. And what figures do you find?

A. Total assets as of December 31, 1936, $33,078.58; December 31, 1941, $53,619.46; December 31, 1942, $102,823.41;

December 31, 1943, $166,773.52; December 31, 1944, $243,-713.92; December 31, 1945, $283,052.99; December 31, 1946, $304,671.93; December 31, 1947, $323.914.72.

Q. And that you say is the "Total Assets"?

A. Yes.

Q. Now, I see a figure here "Less Liabilities, Loans Payable," — where do you get the figures which you used to arrive at those?

A. That is the grand totals from page No. 5, Loans and Mortgages Payable for each of the years as listed.

Q. Now, I note that that is under the "Total Assets." What have you done then on your chart?

A. I have subtracted the total liabilities from the total assets to arrive at a net worth at the end of each year.

Q. Will you tell me what you found to be the net worth for the various years?

A. The net worth as of December 31, 1936 was, $18,578.-58; December 31, 1941, $38,368.88; December 31, 1942, $80,-084.43; December 31, 1943, $150,228.30; December 31, 1944, $231,029.26; December 31, 1945, $270,968.33; December 31, 1946, $296,087.27; December 31, 1947, $322,877.34.

Q. How do you explain the next line, "Less Net Worth beginning of period"?

A. The net worth at the beginning of the period is subtracted from the net worth at the end of the period —

Q. (Interposing.) Please define period when you say that.

A. Well, in this case it is each — the first period is from December 31, 1936, to December 31, 1941. Each of the subsequent periods are individual years.

Q. Well, now, you took what he was worth at the beginning of the period and from that what did you subtract? Pardon me —

A. (Interposing) I took the net worth at the end of the period for the year and substracted it from the beginning.

Q. You subtracted the beginning from it, is that correct?

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A. Substract the beginning from it to obtain the net worth increase for the year or period.

Q. Now, what did you find to be the increase in net worth between the 31st day of December, 1936, and the 31st day of December, 1941?

A. That increase was $19,790.30.

Q. What did you find to be the increase in net worth for the period from December 31, 1941, to December 31, 1942?

A. That increase was $41,715.55.

Q. And the same with reference to the period December 31, 1942, to December 31, 1943.

A. $70,143.87.

Q. And what was the net worth increase for the period beginning with December 31, '43 and ending with December 31, '44?

A. $80,800.96.

Q. And the same with reference to the year beginning December 31, 1944 and ending December 31, 1945?

A. That increase was $39,939.07.

Q. And what was the net worth increase during the year beginning December 31, 1945 and ending December 31, 1946?

A. $25,118.94.

Q. And what did you find to be the increase in net worth for the year beginning December 31, '46 and ending December 31, '47?

A. $26,790.07.

Q. Now, "Non-taxable Income," I see is the next line on this exhibit, right under the "Increase in Net Worth." Can you tell me what you mean by "Less: Non-taxable Income"? What did you do with that Line? Explain it.

A. That line refers to the non-taxable portion of long-term capital gains — and non-taxable interest, or income.

Q. You should perhaps explain non-taxable gains, just briefly, so that we are sure we all understand it.

A. The non-taxable portion of capital gain would be 50 per cent of the profit made on the sale of a capital asset,

such as property or capital stocks, which have been held by the taxpayer for a period of over six months.

Q. Well then, the fact that you made some entries under "Less non-taxable gains," would that mean that you had found that certain of the income in that year was from the sale of capital stock or capital properties?

A. That is correct.

Q. And that some of the income there was exempt from taxation?

A. Yes.

Q. Well now, that you found some of that income was exempt from taxation, what have you done with it with reference to the total increase in net worth?

A. That has been subtracted from the increase in net worth to obtain the taxable increase in net worth.

Q. Mr. Kleven, I note that for the years '36 to '41, and the year '41, '42, and '43, you have made no entry of non-taxable income, is that correct?

A. That is correct.

Q. Now, will you tell me what non-taxable income you found in this taxpayer's activities during the year beginning December 31, 1943, and ending December 31, 1944?

A. The amount I found for that year was $1,653.97.

Q. And now the tax year ending December 31, '45, how much did you find?

A. $2,352.47.

Q. And the year ending December 31, '46, how much of that type of income did you find?

A. $104.73.

Q. And the year ending December 31, 1947, how much of that type of income did you find?

A. $2,283.28.

Q. Now, what have you done with that non-taxable income with reference to the increase in net worth?

A. I have substracted it from the total increase in net worth to obtain a taxable increase in net worth.

Q. What have you called the line where you entered those figures?

A. "Net Worth Increase of Taxable Income."

Q. And the figures I believe you have stated that you have not made any subtraction for the years up to and including 1943, is that correct?

A. That is correct.

Q. Then, the figures will remain the same on this list as they were on the increase in net worth line, will they not, for those years?

A. Yes, they will.

Q. The years which you have subtracted non-taxable income, will you give me the total result which you have entered in "Net Worth Increase of Taxable Income"?

A. For the taxable year ended December 31, 1944, the net worth increase of taxable income was $79,146.99; for the taxable year ended December 31, 1945, the increase was $37,586.60; for the year ended December 31, 1946, it was $25,014.21; for the year ended December 31, 1947, the increase was $24,506.79.

Q. Mr. Kleven, — I do not believe, — correct me if I am wrong — I do not believe we gave the sources from which we obtained the figures under non-taxable income, did we?

A. No, sir.

Q. Would you give them, please?

A. It would be the income tax returns for each one of those years, 1944 through 1947, Government's Exhibits 8, 9, 10, and 11, and Government's Exhibits 206, 54, 56, 204, No. 32, 85, 83, 98, and 95, and also from other information contained on the chart.

Q. Well, now, Mr. Kleven, "Net Worth Increase of taxable income," — I see under that you have "Plus Living Expenses." Can you explain that? Have you added living expenses on here?

A. Yes, I have.

Q. Can you explain why you have done that?

A. Well, a person's income for each year would be guided into ordinary living expenses and his savings which he acquired during the year, and the savings would represent his increase in net worth. The total of his savings and his living expenses would equal his income for the year.

Q. Well, then, what have you done with the living expenses and the increase in net worth? Is this what you would call the savings then, the increase in net worth?

A. Yes, that could ordinarily be conceived of as being the savings on a cost basis.

Q. And then the living expenses you say are expenditures?

A. Ordinary current living expenses.

Q. And totalled together they make the total of what the income should be, is that correct?

A. Well, including the income taxes, which are also—

Q. (Interposing) That is something else that is spent?

A. Yes.

Q. Well, now, will you tell us how you arrived at your figures for, — which you have under "Plus Living Expenses"?

A. The figures for living expenses were obtained from Mr. Weinstock's testimony and Mr. McKusick's testimony.

Q. Now, will you explain the exact figures you have on here?

A. The first figure there in 1941 of $30,000.00 represents five years' living expenses at $6,000.00 a year for a total of $30,000.00; the figure for 1942 is $10,000.00; for 1943, $10,000.00; for 1944, it is $10,000.00; 1945, $10,000.00; for 1946 it is $12,000.00; for 1947, it is $12,000.00.

Q. Now, "Federal Income Taxes Paid," — can you explain your purpose in setting that line where you did?

A. That is in the nature of a living expense, but it has been separated here so as to distinguish ordinary living expenses from federal income taxes paid, and that is something that you earn and pay out during the year and have no balance at the end of the year.

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Q. You mean, you did not have anything to show for the taxes you paid except what benefits you might get indirectly, is that what you mean?

A. That is correct.

Q. Now, will you explain your figures then and the source of your figures?

A. Those figures are in Government's Exhibit 201, which was entered by stipulation, and the total for the years from 1937 through 1941, inclusive, is $6,409.61; the year 1942, $267.66; for 1943, $17,366.35; 1944, $3,639.71; for 1945, $131.17; for 1946, $5,482.44; for 1947, $9,565.66;

Mr. Landrum: Mr. Lord, will you come here just a moment, please, sir? If the Court please, may the record show that the figures which he is now giving there, are the figures stipulated to by counsel and the stipulation is on record in this case. That is correct, is it not?

Mr. Kyle: With reference to income taxes paid?

Mr. Lord: Yes.

Q. (By Mr. Lord) Now, Mr. Kleven, you heard a stipulation read into the record with reference to the amount of income taxes paid, did you not?

A. Yes, I did.

Q. And these figures you took from that stipulation, is that correct?

A. That is correct. Those items represent the actual moneys paid during the year and not the assessments made on the tax returns.

Q. Well, then, you have another line that shows exactly what the assessments were according to what was reported, do you not?

A. Not on that chart.

Mr. Landrum: Go ahead, please.

Q. (By Mr. Lord) Now, Mr. Kleven, with reference to "Adjusted Gross Income of T. W. Banks and Rita Banks," what does that mean?

A. That represents the total of the taxable increase in net worth, plus living expenses and federal income taxes paid.

Q. What is the "Adjusted Gross Income," then — is that what you say that is?

A. Yes.

Q. Now, what is the first figure on that line? How many years does that represent?

A. That represents 1937, 1938, 1939, and 1941.

Q. What is that amount?

A. It is $56,199.91.

Q. And the next figure for the year ending December 31, 1942?

A. $51,983.21.

Q. That is income in one year? A. Yes.

Q. And the income in the next year, ending December 31, 1943?

A. $97,510.22.

Q. And the income for the year ending December 31, 1944?

A. $92,786.70.

Q. And the income for the year ending December 31, 1945?

A. $47,717.77.

Q. And the income for the year ending December 31, 1946?

A. $42,496.65.

Q. And the income for the year ending December 31, 1947?

A. $47,072.45.

Q. I note the next entry is "Less Income Reported by Rita Banks"—can you tell me how and why you put that line and those words down there?

A. Well, many of the assets that are listed in this net worth statement are in the name of Rita Banks and in the Government Exhibits No. 70 and 71 there is an explanation —

Q. Would you read that portion of Government's Exhibits 70 and 71, which has reference to your reasons for putting down Rita Banks' income tax paid and including her assets in this net worth chart? Those are the questions and answers that were submitted to Mr. O'Gordon, are they not?

A. Yes. I will read the preview here: "The investigation has disclosed certain assets and liabilities in the name of Rita Lee Banks; others in the name of Thos. W. Banks; and still others in joint tenancy.

"Question: (A) Does the acquisition of the joint tenancy assets mentioned above represent investments of income by Thomas W. Banks or by both he and Rita Banks?

"Answer: Thomas Banks.

"Question: (B) Does Thomas W. Banks consider Rita Lee Banks individually liable for cumulative net worth (as determined from assets in her name) in excess of funds available from her reported income, or does he hold himself liable for her excessive cumulative net worth?

"Answer: Rita Banks' assets acquired from Thomas Banks."

Q. Now, Mr. Kleven, I notice this question says, "Does Thomas Banks hold Rita Banks individually liable for cumulative net worth (as determined from assets in her name) in excess of funds available from her reported income * * * ?" Now, here you have a reported income, is that right?

A. Yes.

Q. And you are deducting that, is that correct?

A. I am deducting her reported income.

Q. Now, will you tell me where you got your figures which you enter under income reported by Rita Banks in the various years?

A. The income for that first period ending December 31, '41, was obtained from the Banks and Shepard partnership records.

Q. Did she report any income there herself?

A. I do not know if there was a return filed for it, but it showed as her distributive share of the partnership income.

Q. And you deducted that?

A. Yes. The figures following were obtained from her personal returns, Government's Exhibits Nos. 16 to 21, inclusive.

Q. What are those figures?

A. For the year of 1942, the figure is $464.65; for the year 1943, $478.63; for the year 1944, $1,030.68; for 1945, $1,374.38, for 1946, $948.40; 1947, $352.42.

Q. I believe, Mr. Kleven, we had just completed the line "Less Income reported by Rita Banks."

A. I think we went through the second line "Adjusted Gross Income of T. W. Banks."

Q. Well, then, we have gone through adjusted gross income for the various years, and you have read those figures, have you?

A. Yes.

Q. Now, the next line "Less Personal deductions per returns" — can you explain where you got the information there and what it means, — why you put that line where you did?

A. Those deductions are the deductions as shown per taxpayer's returns for the years of 1937 through 1947.

Q. What exhibits did you use?

A. With the exception that in 1945 two items classified under business deductions were considered as ordinary deductions, otherwise those items all represent the deductions as shown per Mr. Banks' returns.

Q. Do you have the exhibit numbers now for those returns?

A. The exhibit numbers 1 through 11, inclusive.

Mr. Landrum: Would you read those figures into the record?

The Witness: Personal reductions for returns for the years of 1937 through 1941, inclusive, are $10,781.38, 1942, $2,709.41; 1943, $2,164.65; 1944, $1,849.34; 1945, $2,653.28; 1946, $4,748.28; 1947, $4,266.96.

Q. (By Mr. Lord) Now, what have you done with the figures that you have just set out on that line?

A. Those have been deducted from the adjusted gross income to arrive at the "Corrected Net Income."

Q. What did you then find to be the corrected net income of Mr. Banks?

A. The corrected net income for the year ended December 31st, — the period from 1937 through 1941, $45,182.10; for the year 1942, $48,809.15; for the year 1943, $94,866.94; for the year 1944, $89,906.68; for the year 1945, $43,690.11; for the year 1946, $36,799.97; for the year 1947, $41,453.07.

Q. And the next line on the chart?

A. "Less Net Income as reported by taxpayer's return."

Q. What have you done with that?

A. Those are Exhibits 1 through 11.

Q. How much did he report for the period beginning December 31, 1936 and ending December 31, 1941?

A. $22,577.14; for 1942, reported $14,415.92; for the year 1943 he reported $21,307.01; for the year 1944 he reported $11,858.28; for the year 1945, he reported $20,170.11; for the year 1946 he reported $27,100.99; for the year 1947 he reported $20,609.29.

Q. What is the last line on this chart, Mr. Kleven?

A. That is "Unreported Income." That is the difference between "Corrected Net Income" and the "Net Income as Reported per return."

Q. Now, what did you find to be the unreported income of this man for these various years?

A. For the period of 1937 to 1941, inclusive, $22,604.96; for the year 1942, $34,393.23; for the year 1943, $73,559.93; for the year 1944, $78,048.40; for the year 1945, $23,520.00; for the year 1946, $9,698.98; for the year 1947, $20,843.78.

Mr. Lord: At this time, Your Honor, we reoffer in evidence Government's Exhibits 224 and 225.

Mr. Graff: If the Court please, we have the same objections that have heretofore been stated into the record with respect to both exhibits.

The Court: The exhibits are received.

Q. (By Mr. Lord) Mr. Kleven, assume that for the calendar year 1945 an individual filing on a cash basis had an adjusted gross income of $46,343.19, which included $2,352.48, recognized as a long-term capital gain, and had allowable deductions of $2,653.28, resulting in net income of $41,337.43, and assume that such individual is entitled to one exemption, what would his income tax liability be for that year?

Mr. Graff: Now, just a moment. We will object to the hypothetical question as now propounded to the witness on the ground that there is not sufficient foundation laid for the facts assumed in the question and on the further ground that the hypothetical question so propounded invades the province of the jury.

The Court: The objection is overruled. (To the witness) You may answer.

A. $22,719.28.

Q. (By Mr. Lord) Mr. Kleven, assume that for the calendar year 1946 an individual filing on a cash basis had an adjusted gross income of $41,548.45, which included $49.72, recognized as a long-term capital gain, and had allowable deductions of $4,748.26, resulting in net income of $36,750.45, and assume that such an individual is entitled to one exemption, what would his income tax liability be for that year?

Mr. Graff: May we have the same objection as to the previous question, Your Honor?

The Court: It may be understood. (To the witness) You may answer.

A. $16,386.51.

Q. (By Mr. Lord) Mr. Kleven, assume that for the calendar year 1947 an individual filing on a cash basis had an adjusted gross income of $45,720.03, which included $2,283.28 recognized as a long-term capital gain, and had allowable deductions of $4,266.96, resulting in net income of $39,169.79, and assume that such an individual is entitled to one exemption, what would his income tax liability be for that year?

Mr. Graff: May we make the same objecton that we did with reference to the year of 1945, Your Honor?

The Court: It may be understood.

A. $19,022.69.

Q. (By Mr. Lord) Mr. Kleven, state whether or not at our request there has been prepared under your general supervision and using your figures a further analysis to help to explain and depict the evidence in this case concerning the net income reported, the income tax which the Government claims should have been reported, and the unreported income in this case for the years '45, '46, '47?

A. Yes.

Q. (By Mr. Lord) Now, Mr. Kleven, I show you Government's Exhibit 226. Can you tell us what that is? If my question needs further explanation, I suggest that you do that now.

Mr. Hoffmann: Now, if the Court please, we suggest that the explanation not be an interpretation of an instrument not in evidence.

Mr. Lord: I am asking him what he prepared, Your Honor, and I think that that will help to clarify the exhibit which we propose to introduce. He is not going to give the figures.

The Court: Lay the foundation. I will rule on whether the exhibit is admissible or competent.

Mr. Landrum: Go ahead and answer as to what you did Mr. Kleven, please, sir.

A. This Exhibit No. 226, contains the taxable net income reported per tax returns for '45, '46, and '47, taxable net income as claimed by the Government for '45, '46, and '47.

Federal income taxes as reported, Federal income taxes Government claims should have been reported, Federal income taxes Government alleges should have been, but were not reported.

Q. (By Mr. Lord) Where did you get the figures from which you made this chart?

A. The figures for taxable net income reported are as shown in the taxpayer's returns, Government's Exhibits 9, 10, and 11. The taxable net income as claimed by the Government is the amount that is shown, with the exception of the 20-cent error, is the amount as shown in Government's Exhibits 225 and 224; and the Federal income taxes as reported are as shown per return for Government's Exhibits 9, 10, and 11. The other columns have ben computed with the use of income tax tables.

Q. Did you personally as a result of the evidence in this case make the computations which you show on the last two columns of this exhibit?

A. Yes, I did.

Mr. Lord: At this time, Your Honor, we offer in evidence Government's Exhibit 226.

The Court: Well, when you said "this exhibit," you meant Exhibit 226?

Mr. Lord: Yes, Your Honor.

Mr. Graff: If the Court please, with respect to Exhibit 226, now a part of the exhibit is taken from the tax returns, but when you get to the second last column, we submit that the figures in there are conclusions of this witness and we object to the exhibit on the ground that it is a conclusion

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of this witness and is not evidence of a fact. May the general objection that we have to 224 and 225 also apply to 226?

The Court: That is agreeable. (To the witness). Are the figures in the last two columns of this exhibit anything more than a mathematical calculation?

The Witness: That is all, Your Honor.

The Court: You made the calculation?

The Witness: Yes, I did.

The Court: Well, now, have you an inquiry?

Mr. Lord: Yes, Your Honor. I think that he may have — there is something other than a mathematical computation that entered into this,—isn't there, Mr. Kleven?

The Court: No, I said the data in the last two columns. Did those columns contain anything except the calculations of this witness?

Mr. Lord: Apparently that is all, Your Honor.

The Court: The exhibit is received.

Q. (By Mr. Lord) Mr. Kleven, will you state whether or not for the purpose of further illustration and clarification, and for the purpose of helping this Court and jury further understand and interpret the evidence in this case, there has been prepared under your general supervision and direction an enlargemnt of Government's Exhibit 226 in such size and form as can be seen by all the jury and the Court at one time?

A. That is correct.

Mr. Hoffmann: In order to expedite matters, Your Honor may all of the objections noted in the record with respect to Exhibit 226 apply to the proposed Exhibit now to be marked by the Clerk?

The Court: That is agreeable.

Q. (By Mr. Lord) Mr. Kleven, I show you Government's Exhibit 227 for identification. Is that the exhibit which has been prepared under your direction, reflecting the entries in Government's Exhibit 226?

A. Yes, sir.

Mr. Hoffmann: May the record show that my statement a moment ago may apply to the exhibit now marked 227?

The Court: That may be understood.

Q. (By Mr. Lord) Are the figures thereon contained the same figures which are set out in Government's Exhibit 226?

A. Yes, they are.

Mr. Lord: At this time, Your Honor, we offer in evidence Government's Exhibit 227.

Mr. Graff: I think our position with respect to Exhibit 227 has already been stated, Your Honor, and we make the same objections to 227 as we do to 226 and 224 and 225, as have been heretofore taken.

The Court: The exhibit is received.

Q. (By Mr. Lord) Now, Mr. Kleven, referring your attention to Government's Exhibit 227, can you tell me just what it is?

A. As stated in the heading.

Q. And for the record, will you tell me what is stated in the heading?

A. Analysis of testimony-income taxes—Thomas W. Banks.

Q. Now, with reference to the first column, will you tell me what that is, — what is the heading?

A. "Year." 1945, 1946, 1947.

Q. And after that in the next column, will you tell me what the heading is?

A. "Taxable Net Income Reported by Thomas W. Banks per Tax Returns."

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Q. And what is the amount for 1945?

A. $20,170.11.

Q. What is the next column?

A. "Taxable Net Income as claimed by Government."

Q. And what is that? A. $43,690.11.

Q. That is for the year 1945, is it not?

A. For the year 1945.

Q. What is the next column?

A. "Federal Income Taxes as reported," for 1945.

Q. And what is it? A. $7,675.27.

Q. What is the next column?

A. "Federal Income Taxes Government claimed should have been reported."

Q. What is that for the year of 1945?

A. $22,719.33.

Q. What is the next column?

A. "Federal Income Taxes Government alleges should have been but were not reported."

Q. And what is that amount for 1945?

A. $15,044.06.

Q. Now, for the year 1946, will you tell me the taxable net income reported by Thomas W. Banks per tax returns?

A. $27,100.99.

Q. And what taxable net income as claimed by the Government for the year 1946?

A. $36,799.97.

Q. And how much income tax did Mr. Banks report for the year 1946?

A. $10,556.98.

Q. What is the amount of Federal income taxes the Government claimed should have been reported?

A. $16,386.39.

Q. What is the amount of Federal income taxes that the Government alleges should have been reported but were not reported?

A. $5,829.41.

Q. Now, with reference to the year 1947, can you tell me the taxable net income reported by Thomas Banks per his returns?

A. $20,609.29.

Q. And what is the taxable net income as claimed by the Government for that year?

A. $41,453.07.

Q. Now, how much Federal income taxes were reported by Mr. Banks for the year 1947?

A. $6,955.14.

Q. What is the amount of Federal income taxes the Government claims should have been reported for the year 1947?

A. $19,022.69.

Q. Now, what is the amount of Federal income tax that the Government alleges should have been reported but were not reported for the year of 1947?

A. $12,067.55.

CROSS EXAMINATION

By Mr. Graff:

Q. Mr. Kleven, I understand you are presently employed as a revenue agent in the Bureau of Internal Revenue of Minneapolis, Minnesota, is that correct?

A. That is correct.

Q. And that you have been so employed for approximately six years, is that right?

A. That is right.

Q. Now, in connection with the matter before the Court, was it your job to take the material which had been collected by Mr. McKusick and attempt to correlate that information?

A. That was part of my job.

Q. Did you make any independent investigation at all of the matters pertaining to the taxpayer?

A. Most of the time Mr. McKusick and I were together, but I may have made some independent investigation.

Q. By and large would you say that the independent investigations conducted by you were a relatively small part of the entire investigation?

A. Yes, I would.

Q. And the majority of the investigative work which was done was done by Mr. McKusick and the others?

A. I assisted him after I started in the case.

Q. Yes, and you got into the case sometime in January of 1951?

A. That is correct.

Q. And after you got into the case and after you had an opportunity of going over all the material that Mr. McKusick had assembled, and made the independent investigation that he made, did you then start putting your figures together, so to speak?

A. Yes, about that time I did.

Q. And about when was it that you started, so to speak, to put your figures together?

A. Oh, I could not give you any exact date now.

Q. Approximately?

A. It would be in the spring of 1951.

Q. On your direct examination you indicated that you worked on this matter from January, 1951, until you completed your report in May of 1951?

A. Correct.

Q. And then you did not further work on this case until you were called over to the United States Attorney's office in January of 1952?

A. That is correct.

Q. And that since January of 1952, you have been working more or less steadily on this case?

A. That is correct.

Q. Now, Mr. Kleven, when you prepared Exhibit 224 and 225, did you include therein for the period December 31, 1936, to and including December 31, 1947, all of the property of the taxpayer?

A. Are you asking about the entire exhibit or just referring to the first page?

Q. The entire exhibit, for the entire period.

A. To the best of my knowledge, all the property that we could find.

Q. I am asking you, Mr. Kleven, — did you include it all?

A. Yes, to the best of my knowledge, I put in everything that I could find.

Q. Now, Mr. Kleven, did you make any search or investigation to find any other property owned by the taxpayer during the period December 31, 1936 to December 31, 1947?

A. Will you read that question, please?

(The question was read.)

A. Didn't I just answer that? Wasn't that the question you asked me before?

Q. No.

A. I do not quite understand that question.

Mr. Graff: May it be read to him again, if Your Honor please?

The Court: You will read it, Mr. Reporter.

(The question was reread.)

A. Other property than what?

Q. (By Mr. Graff) Than that disclosed on Exhibits 224 and 225.

A. Yes, we made a search —

Q. (Interposing) No, did you make any search to find any other property belonging to this taxpayer for the period December 31, 1936 to the period December 31, 1947?

A. Yes, I did.

Q. Did you find any?

A. No, — I found some different valuations.

Q. Did you find any other property?

A. No, I found no other property.

Q. I see. Now, Mr. Kleven, did you personally find any other assets or liabilities of the taxpayer other than disclosed by Exhibits 224 and 225?

A. I would say that we found some minor negligible items that are not included.

Q. Not "we," — I am asking you personally, Mr. Kleven.

A. Well, I have seen a couple of items, —

Q. Did you personally find any?

A. You mean my own personal investigation?

Q. You, Mr. Kleven, did you personally find any?

A. I do not know if I found them. I was aware of them.

Q. You can answer it, I think, very simply, either you found some or you didn't find some.

A. Oh, I found some. I was not the original finder, I would say.

Q. Did you find some assets or liabilities which you did not include on Government's Exhibits 224 and 225?

A. Yes, I did.

Q. Then Exhibits 224 and 225 that you have introduced into this court does not include all the assets and liabilities that you found of this taxpayer, is that correct?

A. It is to the extent that they are so negligible that they are unimportant in this case.

Q. So you determined, did you, Mr. Kleven, that you would not bring in here all the assets and liabilities of this taxpayer?

A. Yes, — I will explain one of them. One of them is —

Q. (Interposing) Just a moment. Just answer my questions.

Mr. Landrum: If the Court please, I submit that he is asking to be permitted to explain.

Mr. Graff: I beg to differ with counsel, Your Honor. This is our opportunity to ask this witness questions and I suggest that he be asked to answer our questions.

The Court: We must be fair with the witness, of course. (To the witness) If you can explain in a few words, you may do so.

The Witness: Yes, I will. Thank you, Your Honor.

There is one asset listed in the taxpayer's affidavit of some land down in Texas that said that he paid $2.00 or $3.00 a year real estate taxes on it, and we did not make a complete investigation to see what the cost of that property was.

The Court: So you left that asset, if it is an asset, out of the report?

The Witness: Yes, we left it out of the report.

Q. (By Mr. Graff.) Now, Mr. Kleven, is that the only asset of this taxpayer that you omitted from Government's Exhibits 224 and 225?

A. There is one other one that I know of.

Q. Will you tell us about it, please?

A. And that is the one that you were questioning Mr. McKusick about earlier, the Northwest Novelty Company, which was a partnership venture which dealt in some type of coin machines and which did not have a capital investment. At the end of the year the total investment for the partners was approximately $200.00 and it was so neglible that we did not take it into account in our calculations.

Q. I am not asking you, Mr. Kleven, what you as a group did. You have come here and testified as an individual, have you not?

A. Certainly.

Q. And you have come here and testified that you prepared Government's Exhibits 224 and 225?

A. That is correct.

Q. And you have come here and testified that you have made the calculations?

A. Yes, sir.

Q. Now, did you, Mr. Kleven, determine that you were not going to include the investment of this taxpayer in Northwestern Novelty Company?

A. Did I determine that?

Q. Yes. A. Yes, I did.

Q. You determined, then, to omit from Exhibits 224 and 225 this land that you described in Texas?

A. That is correct.

Q. And the investment in the Northwestern Novelty Company in Minneapolis. Now, did you decide—you personally—to omit any other assets from Exhibits 224 and 225?

A. No, I did not.

Q. Then it is your testimony, Mr. Kleven, that with the two exceptions that you have now given us, Government's Exhibits 224 and 225 include all of the assets of this taxpayer?

A. All that I am aware of.

Q. And if there should be some assets, Mr. Kleven, that are not included on Exhibits 224 and 225, then those reports are in error, are they not?

A. If there are any assets of a substantial nature, it might make them in error.

Q. Yes. Now, you made the computations on Exhibit 224 on the basis of the so-called "Net worth method", did you not?

A. Yes, I did.

Q. And you used as your starting point the date of December 31, 1936, is that correct?

A. That is correct.

Q. Now, if the material, Mr. Kleven, that you used for your starting point is incorrect, then all of your calculations must necessarily be wrong?

A. I would not say all of them.

Q. Isn't it a fact, Mr. Kleven, that all of the figures that you have on Exhibits 224 and 225 are predicated upon the assumption that your starting point of December 31, 1936 is correct?

A. It is predicated on that assumption.

Q. Yes. And if that assumption is incorrect, then, of course, the whole thing must fall?

A. I would not say that.

Q. You would not say that. What would you say?

A. I would say if there was some small assets that might be some—that we did not find, that was not included in the affidavit, that it would be absorbed.

Q. And would be absorbed by what?

A. Probably in the first year or two.

Q. I see. And how would it be absorbed?

A. In the unreported income.

Q. It would be absorbed in unreported income?

A. Yes.

Q. That is your answer? A. That is correct.

Q. And if there was no unreported income, how would it be absorbed?

A. It would not be. It would not be absorbed.

Q. Now, when you prepared Government's Exhibit 224, did you have the option of selecting whether you were going to use December 31, 1936, or December 31, 1937, as your starting point?

A. Did I have the option?

Q. Yes.

A. Certainly I had the option.

Q. And it was your determination to use December 31, 1936, as the starting point?

A. That is correct.

Q. And you could have, if you so desired,—could have used the starting point of December 31, 1937?

A. Yes.

Q. Now, would you be good enough to tell us why you selected December 31, 1936, instead of December 31, 1937?

A. Yes, I will. I had the records from the prior revenue agents who completed a fraud report on Mr. Banks covering the years 1920 to 1933—

Mr. Graff: (Interposing.) Well, now, just a moment. I object to the characterization of the kind of report that this witness is testifying to.

The Court: You may proceed.

A. (Continuing.) This covered the period of 1920 to 1933 and was based on a net worth basis. I took the ending net worth as shown in that report and worked it down to the basis at the end of 1936 which—

Q. (By Mr. Graff.) Do you have that—

Mr. Landrum: (Interposing.) Let him finish it, please.

A. (Continuing.) —which balanced out with the affidavit as shown in the records.

Q. (By Mr. Graff.) I see. You were satisfied, Mr. Kleven, that the affidavit balanced out, so to speak?

A. Yes, I was.

Q. I see. And do you have that report with you that you relied upon in selecting December 31, 1936 as your starting point?

A. What report?

Q. You referred to a report here in evidence that you used in selecting that date as your starting point.

A. That report is not in evidence.

Q. I did not ask you that. I asked you whether you had it with you?

A. I do not have the complete report. I have the balance sheet.

Q. Now, Mr. Kleven, on Exhibit 224 you show what figure of cash in the possession of the taxpayer as of December 31, 1936?

A. $159.15.

Q. What proportion of the $159.15 was in the possession of Rita Banks as of December 31, 1936?

A. That was all in the name of Rita Banks, in her bank account.

Q. I see. And the amount of that again was how much? I am sorry, I could not get the amount.

A. $159.15.

Q. I see. And how much cash did the taxpayer Tom Banks have in his possession as of December 31, 1936—and I would like to have you refer me to the exhibit upon which that answer is contained.

A. He had none.

Q. Now, would you give me the exhibit reference number? What is the exhibit reference number that proves that fact?

A. Well, I could not count the cash he had in his pocket twelve years ago.

Q. Just a moment, Mr. Kleven. I asked you to give us, if you please, the exhibit number that is in evidence in this case that proves the statement that you have made.

A. Exhibit No. 33, the affidavit reported no cash.

Q. I hand you, Mr. Kleven, Government's Exhibit 33, which has been identified as an affidavit dated July 2, 1937, and I would like to have you point out to this Court and jury what is contained in that affidavit which shows that the taxpayer, Tom Banks, had no cash on December 31, 1936.

A. The total of the assets listed in this affidavit are about $13,000.00. We have set them up here at about $18,000.00.

Q. Would you please point out to me in Government's Exhibit 33, the statement or statements which show that Tom Banks had no cash on December 31, 1936?

A. There is no statement, but I can work it back by analysis.

Q. There is no statement in that exhibit?

A. No, not as of December 31, '36.

Q. I see. And there is no exhibit in evidence in this case, is there, Mr. Kleven, to which you can point which proves that Tom Banks had no cash on December 31, 1936?

A. Well, you can say that as far as personal cash for every single year on the whole balance sheet.

Q. Well, just take '36 first.

A. Yes.

Q. So there is no exhibit in evidence in this court which shows how much cash Tom Banks had as of December 31, 1936? That is correct, is it not?

A. That is correct.

Q. Is there any testimony in this case that you have heard that establishes the amount of cash that Tom Banks had in his possession on December 31, 1936?

A. I do not recall any.

Q. Now, Mr. Kleven, would you be good enough to tell me what exhibit is in evidence before this Court which shows the amount of cash that Tom Banks had in his possession on December 31, 1937?

A. There is none.

Q. Isn't it true, Mr. Kleven, that there isn't a single exhibit which is in evidence before this Court which shows the amount of cash which Tom Banks had in his possession on December 31st, for the year '36 to '47, inclusive?

A. There are no exhibits except the bank accounts.

Q. Now, those are what exhibits?

A. Exhibit No. 72—

Q. (Interposing.) All right, let us take them one at a time. Now, 72 is a ledger card, is it not, of a bank?

Exhibit 72, I think, has been identified as a ledger card of the Marquette National Bank of Minneapolis showing deposits, or showing the account of Thomas W. Banks. Is that right?

A. Yes, it is.

Q. Now, does Exhibit 72 show the total amount of cash that Tom Banks had in his possession as of December 31st for any of the years reflected by Exhibit 72?

A. It gives the bank balances at the end of the year.

Q. It will give a bank balance, but it does not give the total cash that he had as of that time, would it?

A. No, he had other bank accounts.

Q. Yes. And Exhibit 72 does not purport to give the total cash that Tom Banks had as of December 31st of any given year, does it?

A. No, it does not.

Q. It only shows the amount that he had to his credit in that particular bank account?

A. That is correct.

Q. So let me ask you the question again: Is there any exhibit which is in evidence before this court which gives the total amount of cash that Tom Banks had as of December 31st, of any year for the years '36 to '47?

A. The total is shown on Government's Exhibits 224 and 225.

Q. That is your calculation, is it not?

A. That is correct.

Q. Are there any exhibits in evidence before this Court which show, other than 224 and 225, the total amount of cash that Tom Banks had as of December 31st for the years '36 to '47, inclusive?

A. No, sir, those are the only ones in court.

Q. Now, Mr. Kleven, other than your testimony concerning Exhibits 224 and 225, there was no testimony adduced in this court showing the total amount of cash that Tom Banks had in his possesion as of December 31st for the years '36 to '47, inclusive? Isn't that right?

A. Will you read that question to me again, please?

(The question was read.)

A. I think his affidavit showed no cash.

Q. I think my question concerned testimony,—the affidavit has been identified as Exhibit 33.

Mr. Landrum: He has been asking about exhibits. Now, the witness has told him one, Your Honor.

Mr. Graff: Just a moment, if the Court please. I have a question pending and I would like to have the witness answer it.

The Court: If there is any further answer you can give to the question, you may do so.

A. Do you mean oral testimony?

Q. (By Mr. Graff.) Yes.

A. No, I do not recall any oral testimony.

Q. There wasn't any, isn't that a fact?

A. There wasn't any cash?

Q. Mr. Kleven, there was no oral testimony—

A. (Interposing.) I stated there wasn't.

Q. Yes. Now, Mr. Kleven, I notice from Exhibit 224 that it has reports for the year 1936, but it omits the years '37, '38, '39, and 1940, isn't that correct?

A. That is correct.

Q. And that is likewise true of Exhibit 225?

A. That is correct.

Q. Now, Mr. Kleven, I would like to direct your attention to the item 9, "Bonus Bond", $200.00. First of all, what kind of a bond was that?

A. One mentioned in Mr. Banks' affidavit.

Q. I see. And did you accept that description of the bond as being true and correct?

A. Yes, whatever he said it was, we accepted.

Q. You accepted it. And you accept as correct the statements that taxpayers make as a general rule?

A. Under conditions like this, we do.

Q. In other words, if the situation is one where it is convenient for you to accept it, you accept it and when it is not convenient for you, you reject it, is that right?

A. Well, we always would accept the statement made by the taxpayer when he is making it voluntarily against his interest. That is always accepted.

Q. You always accept that. And do you always accept it as true?

A. I would not say always about anything like that.

Q. Well, shall we say that sometimes you do and sometimes you do not?

A. Depending upon the circumstances of the individual.

Q. Surely. Now, I direct your attention to this Bonus Bond. You have it here as of December 31, 1936, is that correct?

A. Yes, sir.

Q. And Exhibit 33 stated that that was a bond of the United States, did it not?

A. Yes, it did.

Q. And did you or any of your people check to determine whether in fact that bond had been issued by the Treasury Department and was outstanding as of December 31, 1936?

A. There wasn't sufficient information to request anything about it.

Q. Mr. Kleven, the reason why no inquiry was made concerning what has been identified as the Bonus Bond in the sum of $200.00 was because you did not have sufficient information concerning it or to identify it?

A. That is right.

Q. And isn't it true, then, that you personally made no effort to identify that bond in the sum of $200.00?

A. No, I took it at face value on the affidavit.

Q. Yes. And was that bond outstanding as of December 31, 1937?

A. From the information I have already told you, I could not identify it,—I could not request any information on it.

Q. So you do not know when the bond was redeemed, if it ever was redeemed?

A. No, I do not.

Q. And neither do you know the amount or the date when it would have been redeemed?

A. No.

Q. The Government, of course, keeps records of bonds issued by it and redeemed by it? You are familiar with that fact, are you not?

A. Oh, yes, they do.

Q. Mr. Kleven, in connection with your work as a revenue agent in connection with this case, did you ever run into any stock of the Old Peoria Company?

A. I noticed that in one of the returns.

Q. You noticed it in a return?

A. Yes, in one of the taxpayer's returns.

Q. And what did you notice in one of the taxpayer's returns about Old Peoria stock?

A. That it had been sold.

Q. And did you notice when it was sold?

A. It was between '36 and '41.

Q. I see. Was the Old Peoria stock an asset of the taxpayer as of December 31, 1936?

A. No.

Q. And you did not include it on Exhibit 224?

A. No, sir.

Q. If the fact was that the taxpayer owned that stock on December 31, 1936, then Exhibit 224 and 225 would be off to that extent, would they not?

A. So would his affidavit.

Mr. Graff: I submit, Your Honor, that is not an answer to my question.

The Court: That is not an answer.

The Witness: I am sorry. If he had owned it prior to 1936, it should have been included as of December 31, 1936.

Q. (By Mr. Graff.) Didn't you have evidence before you that the taxpayer did own it prior to December 31, 1936, and sold it sometime later?

A. No, I did not.

Q. I show you Government's Exhibit 4, which has been identified as the tax return for 1940 of Tom Banks, and ask you if there aren't sales of stock reflected on that Exhibit 4?

A. Yes, there are.

Q. There are, as a matter of fact, two entries, are there not?

A. Yes, there are.

Q. One entry shows that stock was acquired by the taxpayer on August 1, 1935?

A. Yes.

Q. And was sold by the taxpayer on September 15, 1940?

A. The return so states.

Q. So on the basis of Government's Exhibit 4, which you had before you in connection with the work that you did as a revenue agent in this case, you had information that there were stocks which were owned by the taxpayer on August 1, 1935, and were sold by the taxpayer on September 15, 1940, is that correct?

A. Yes, the return showed the date, but that is not evidentiary as far as a revenue agent is concerned.

Q. My question was, Mr. Kleven, that you had information from Government's Exhibit No. 4—and I mean you personally had information—that the taxpayer had stocks on August 1st—had acquired stocks on August 1, 1935, which he sold on September 15, 1940?

A. Yes, I had that information on the returns.

Q. Now, what personal investigation, if any, did you make to determine the identity of the stock disclosed on the return of the taxpayer, Government's Exhibit 4, and which showed he had acquired it on August 1, 1935, and he had sold it on September 15, 1940?

A. I first looked at the prior revenue agent's report. Subsequently I looked at the affidavit, which did not include this stock, and, thirdly, I read the special agent's report on the old case and that disclosed that that stock was not owned by the taxpayer as stated in the return.

Q. And you accepted somebody else's conclusion, Mr. Kleven, concerning the stock which was included on the taxpayer's return for 1940, Government's Exhibit 4, is that correct?

A. I accepted the conclusions of the agents and of the affidavit.

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Q. And you rejected the evidence contained in Government's Exhibit 4?

A. I would not consider that evidence.

Q. Didn't you testify here in court about all the facts and figures that you have gotten from tax returns that were in evidence before this Court?

A. I testified as to facts and figures that were contained in those returns.

Q. And did Exhibits 224 and 225, as prepared by you, include the stocks which were shown in the taxpayer's return for the year 1940, identified as Government's Exhibit 4?

A. The question gets so long. Will you repeat that, please?

The Court: I think that question has been answered in this witness' testimony. (To the reporter.) Read the question, Mr. Reporter.

(The question was read.)

The Court: You may answer.

A. It is not identified as such on those exhibits.

Q. Well, in your answer—in view of your answer, is it on Exhibits 224 or 225 at all?

A. It would be in the net result or the net worth as of the end of '41.

The Court: They are not specified on the exhibits, counsel. That is very clear, and there is no use to spend time on it, as far as that is concerned. There is no contention that they are specified on the exhibits. I have no desire to limit counsel unduly, but at the same time I desire to make progress in the trial.

Mr. Graff: Well, I appreciate that, Your Honor, I am sure Your Honor will bear in mind that this witness started, I think yesterday afternoon, and was on direct examination for a long period of time.

The Court: That is correct.

Q. (By Mr. Graff.) Now, Mr. Kleven, when you did your work as a revenue agent in this case, did you have before you evidence that the taxpayer had received a dividend or income from a partnership known as Shepard and Garland?

A. Yes, I recall that.

Q. And does Exhibit 224 or 225, as prepared by you, show any interest that the taxpayer had in Shepard and Garland for the period December 31, 1936 to December 31, 1947?

A. No, it doesn't show any interest for that partnership.

Q. And yet you had information from Government's Exhibit No. 5, which is the tax return for the year 1941 of the taxpayer, that he had an income of $1,167.92 for 1940 from Shepard and Garland?

A. Right. That partnership was similar to the other one I described before, the Northwest Novelty Company. The money came in and went out during the year so there was no balance for an investment at the end of the year, or if there was, it was negligible.

Mr. Graff: Well, just a moment, if the Court please. I think this is a voluntary statement being made by this witness, not in answer to any question.

The Court: You may read the question and answer, Mr. Reporter.

(The question and answer were read.)

The Court: You may proceed.

Q. (By Mr. Graff.) Did you personally make the investigation in Shepard and Garland?

A. I examined the returns. I do not believe I examined any books.

Q. I see. And if that is true, Mr. Kleven, how did you know what you have just stated a short time ago regarding Shepard and Garland?

A. I believe they had some form of a balance sheet on them, on the returns which indicated the net investment.

Q. Would there be a balance sheet on a partnership return, Mr. Kleven?

A. Ordinarily there is.

Q. For the period of 1941?

A. I do not know about '41.

Q. It came after that, didn't it?

A. I do not recall.

Q. On Government's Exhibits 224 and 225 is an item "T. E. Ewing" and you have shown on Exhibit 224 that that amount was a receivable as of December 31, 1944. Do you have that before you?

A. (No answer.)

Q. You also show that as a receivable as of December 31, 1945, 1946, and 1947. Other than Exhibits 70 and 71, is there any exhibit to which you can direct our attention showing that that amount of $10,000.00 should be listed as a receivable for any of the years as of December 31, 1945, 1946, and 1947?

A. I do not believe so.

Q. And it was, therefore, your conclusion from reading Exhibits 70 and 71, that that receivable was outstanding as of December 31, 1945, 1946, and 1947?

A. My personal conclusion, plus the conclusion of my associates.

Q. It was not your own personal conclusion?

A. I say "plus".

Q. Now, Mr. Kleven, I understand your answer to the last question that it was your conclusion and the conclusion of some of your associates, is that correct?

A. That is correct.

Q. Well, then, is it true, Mr. Kleven, that Exhibits 224 and 225 represent conclusions not only of you but also of some of your associates?

A. Well, I have been assisted — I mean, Mr. McKusick and I have worked this case jointly.

Q. I see. I understood your direct testimony to be that you were the one who had prepared Exhibits 224 and 225.

A. I did.

Q. But it now appears that someone else assisted you with it?

A. In gathering the figures and in making conclusions that I finally adopted in the report.

Q. I see. So that the exhibits as now constituted not only represent your conclusions but they represent conclusions of other people who assisted you?

A. Certainly.

Q. Mr. Kleven, would you turn to page 3 of Exhibit 224?

A. Yes, sir.

Q. Now, I direct your attention to the item identified as item 27, "Merchants Distilling", where you show the amount as outstanding on December 31, 1946 in the amount of $9,380.91.

A. Yes, sir.

Q. Where did you get that item?

A. Exhibit Nos. 87 and 83, and the taxpayer's return, Exhibit No. 11.

Q. Now, isn't it true, Mr. Kleven, that on the taxpayer's return No. 11 for the year 1937, the item 27, "Merchants Distilling" stock was sold during the year 1947?

A. If I could see the return I would be sure—

Q. (Interposing.) Surely.

(Document shown to the witness.)

A. It shows that it was sold in 1947.

Q. And what does Government's Exhibit 11, being the taxpayer's tax return for the year 1947, show as the cost of those shares of stock?

A. $8,420.19.

Q. And the figure you have on Exhibits 225 and 224 is $9,380.19?

A. Correct.

Q. So that your figure on Exhibit 224 differs from the figure on the taxpayer's return, Exhibits No. 11?

A. That it does.

Q. Now, Mr. Kleven, I direct your attention to Item 30, Mohawk Liquor Corporation. You have that listed as $750.-00 as of December 31, 1941 and for the years continuing to and including December 31, 1945, is that right?

A. Yes, sir.

Q. And you indicated on your direct testimony that that figure was derived from Exhibit No. 10 as well as Exhibit No. 33, is that correct?

A. Exhibit No. 33 was used for reference and in which that stock was not indicated.

Q. Now, did you make any personal investigation to ascertain when that stock in the Mohawk Liquor Corporation was acquired?

A. I made the investigation of the affidavit to determine that it wasn't as of that date.

Q. Mr. Kleven, wouldn't it have been an easy matter to check with the Mohawk Corporation to find out about that particular stock?

A. It may have been.

Q. In any event, you didn't do it ?

A. I didn't.

Q. You didn't consider it of sufficient importance to do so?

A. No, it wasn't of sufficient importance.

Q. You didn't regard it as such?

A. No.

Q. On the tax return, Government's Exhibit 10, it is disclosed, is it not, that the hundred shares of stock in the Mohawk Liquor Corporation were acquired by the taxpayer in 1936 and were sold by him during the year 1946?

A. The return so states.

Q. And the return shows that it was sold at a gain over the purchase price?

A. If I remember correctly, it does.

(Document shown to the witness by Mr. Graff.)

A. (Continuing.) Yes.

Q. So the taxpayer had possession of this stock in 1936 as far as disclosed by Government's Exhibit 10 is concerned, is that correct?

A. Yes, the return shows that.

Q. Yes. And you elected, shall we say—you personally—to not include it in the statement as of December 31, 1936?

A. I relied on the affidavit which the taxpayer filed July 2, 1937, which he filed with the United States Government, and in which he did not list that stock and in which he listed many other worthless stocks.

Q. And you had the information before you in the tax return when you prepared Exhibits 224 and 225 as to the date of acquisition of the stock and the date of its sale, did you not?

A. No, I did not have it, except the affidavit.

Q. You also had the information before you, Mr. Kleven, did you not, that was contained in Government's Exhibit 10?

A. Yes, I had that.

Q. And you ignored the information?

A. That is correct.

Q. Now, Mr. Kleven, I direct your attention to Item No. 32 of Government's Exhibits 224 and 225, which shows "Cities Service" stock at the end of '36 and '41 to '47, inclusive, as 82,819.53. That is correct, is it not?

A. Yes, sir.

Q. Now, directing your attention to December 31, 1947, on what exhibit or exhibits do you base your conclusion that that stock was outstanding at that time?

A. On Government's Exhibits 1 to 11, inclusive, in which the sale of that stock was not reported.

Q. Now, Mr. Kleven, assuming that a taxpayer had some stock and assume further that he sold the stock and sustained a loss as a result of the sale of that stock, would he have to report that loss in his tax return?

A. I do not know.

Q. So you could not determine absolutely, could you then, from Exhibits 1 to 11 that the taxpayer had not disposed of that Cities Service stock, could you?

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A. It is reasonable to assume that if he had a loss, he would have claimed it.

Q. That was an assumption on your part?

A. Certainly.

Q. And if he sold it exactly for what he paid for it, then would it be equally reasonable to assume that he would not include it in his tax return?

A. That assumption isn't possible on stocks over a period of that many years.

Q. I see. In other words, you don't think that that would be possible?

A. No.

Q. In any event, did you make a personal investigation with the Cities Service Company to determine whether that stock was still held by the taxpayer or whether it had been sold?

A. No, I never made any investigation.

Q. You just assumed for your purposes that the taxpayer still had it and included it on Exhibits 224 and 225?

A. Not completely. I asked Mr. Weinstock about it and he asked Mrs. Banks about it and they found that they had no records of it ever being sold.

Q. Did they have any records of it being on hand, Mr. Kleven?

A. No, they had no records.

Q. Now, Mr. Kleven, directing your attention to Item 31, "Insull Utilities", shown on Exhibit 224 as of December 31, 1936, as having a value of $3,497.40. Would you tell me how you determined the value of that stock?

A. Yes, I would. I believe the affidavit stated that stock was of no value, but it was subsequently sold in about 1938 or '39 and a cost of some $7,000.00 was taken on the return, but the examining officer from our department checked that return and he found the cost basis of that stock to be as shown above. I also checked that with the findings of the agent for the year ending 1933 and that showed that half of

the cost had been declared worthless back in 1932 of the original purchase.

Q. So you again took somebody else's conclusions in making up Exhibits 224 and 225?

A. The affidavit showed no value—

Q. I don't think that answers my question, Mr. Kleven.

A. What was the question?

Mr. Graff: May it be read, Your Honor.

(The question was read.)

A. I wouldn't exactly call them conclusions. They had some basis of fact on which they made out these reports.

Q. On that point, you did not rely on the affidavit, Government's Exhibit 33?

A. Not as to the value of that stock. As to the existence of it, I did.

Q. Now, in making up a net worth statement, Mr. Kleven, —in taking a stock, do you take the value as of the time you make up the statement or do you use the amount of the cost of that stock initially?

A. Please repeat that. The questions are awfully long.

The Court: You may read the question, Mr. Reporter.

(The question was read.)

A. In making a net worth statement, we use the cost basis of the stock.

Q. (By Mr. Graff.) So in appraising or determining the stocks and the values to be ascribed to them as of December 31, 1936, you would use the cost value of those stocks, would you not?

A. Well, in this particular case if that was declared half worthless by the Bureau, I would have to follow the Bureau ruling.

Q. Well, would you take, then, for your beginning net worth the cost of the stocks initially as of December 31, 1936?

A. I would take the cost basis adjusted by the worthlessness of one-half of the stock.

Q. Yes. So that you wouldn't feel yourself bound by any affidavit which the taxpayer may have made six months before or after?

A. In a couple of instances where the taxpayer used apparently market valuations, I attempted to find the actual cost basis of the assets that he had shown in his affidavit.

Q. So that the value that you took for Insull Utilities was not the value in the affidavit, Exhibit 33?

A. That is right. He had no value for it.

Q. So you discarded the affidavit as far as that was concerned?

A. I gave him the benefit of the cost basis.

Q. Well, I mean, you didn't use the affidavit, Exhibit 33?

A. Just as to the existence of it.

Q. Yes, but not as to the amount to be entered?

A. That is right.

Q. Now, I direct your attention to Item 37, "Flour City Body Corporation."

Q. (By Mr. Graff.) Now, I believe when you testified with respect to Item 37, you called attention to Exhibits 146 and 147?

A. Yes, sir.

Q. Now, directing your attention to Exhibit 146—

A. And Exhibit 33.

Q. (Continuing.) —will you point out first what there is in Exhibit 146 that fixes the value of that stock as of $4,000.00 on December 31, 1936?

A. There is nothing in this book that fixes the value of the stock.

Q. Well, I meant, where the figure of $4,000.00 was arrived at?

A. That was arrived at from his affidavit, dated July 2, 1937.

Q. And what is the par value of the stock in the Flour City Body Corporation?

A. The par value is $100.00.

Q. And in arriving at the figure of $4,000.00 for Item 37, Flour City Body Corporation, how many shares of stock did you take into consideration?

A. All that the taxpayer owned.

Q. How many shares of stock?

A. Well, I would have to add them up.

Q. Would you add them up, please?

A. It appears that they owned 200 shares.

Q. And at $100.00 a share, that would be how much?

A. If you used par value, it would give you a $20,000.00 par value.

Q. I see.

A. We were considering cost here.

Q. Have you in any of the figures which you have submitted here in connection with stocks used the par value rather than the cost basis?

A. I would say that I have.

Q. Did you in connection with Item 37 investigate personally to find out what the cost was?

A. I did, but it is of no consequence in this case because the cost remains constant from 1936 through 1947.

Q. And so you could have used the par value so far as you were concerned and it wouldn't have made any difference?

A. It wouldn't have made any difference if we had used $10,000.00, $5,000.00, or $1,000.00.

Q. I see. So you decided that you would not use the market value, or the par value in this case, in the case of Item 37?

A. I used the one that was most logical to use, which was the one that the man had in his affidavit. It was the least argumentative to use.

Q. So you used the affidavit when you felt that that was the convenient thing to use, is that correct?

A. I used it when it made a logical explanation.

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Q. Well, did you, Mr. Kleven, make any personal investigation to find out whether all the statements in the affidavit were true?

A. So far as possible.

Q. Yes, And did you find it to be true?

A. I would say that as a whole that it was.

Q. Now I direct your attention to Item 40, "Wheel Service", showing that as of December 31, 1936 you had a figure of $4,500.00. Was that the cost value, was that the par value, or what value was it?

A. That is the value shown in the taxpayer's affidavit.

Q. And it was also included, was it not, in the taxpayer's return for the year 1940, which showed that it had a different value?

A. Yes, that is true.

Q. That is a different cost value?

A. It showed a different figure for a cost value.

Q. And so you decided which one of the two would suit your purposes best?

A. I used the cost which was apparently more closer to the date of actual acquisition, which was the affidavit.

The Court: Whose affidavit?

The Witness: Mr. Banks' affidavit.

Q. (By Mr. Graff.) What personal investigation did you make to find out the cost basis of the stock in Wheel Service, identified as Item 40?

A. An officer of Wheel Service was in this court room who said that he had no books or records available for this corporation.

Q. Was that the extent of your personal investigation as to Wheel Service?

A. That and the information I have already given you.

Q. I see. That was the extent of it?

A. Yes.

Q. You never contacted the officials of Wheel Service prior to the time that that man was here and testified in the court room?

A. I never did. Mr. McKusick may have.

Q. I am asking what you did personally, Mr. Kleven.

A. That is correct.

Q. And in Government's Exhibit 4, the cost basis is shown as what?

A. The stocks are not identified on the return. There are two sales here but they are not identified by name. Which ones do you identify them?

Q. I think the second one we have already referred to as being the stock of the Old Peoria Company, which was acquired on August 1, 1935.

A. Well, the other one shows the cost or other basis of $1,700.00. Then it showed under line six "expense of sale and cost of improvements subsequent to acquisition on March 1, 1913." It shows $10,377.78.

Q. What was the cost basis then of that stock, Mr. Kleven, according to Government's Exhibit 4?

A. Well, according to the taxpayer's records or figures there, you would add those two that I read off.

Q. What figure do you arrive at?

A. I would have to add it.

Q. Well, you didn't make any personal investigation into it at all?

A. No.

Q. You just took the figure and put it on Exhibits 224 and 225 at a basis of $4,500.00?

A. That is correct.

Q. Now, Mr. Kleven, if you had taken the figures as disclosed by Government's Exhibit 4, wouldn't it have made a substantial difference in your computations with respect to this item?

A. It may have reduced the beginning net worth—

Mr. Landrum: Go ahead and finish your answer.

Mr. Lord: What would that mean?

Mr. Graff: Just a moment—

A. Well, that would have increased his income.

Q. (By Mr. Graff.) So that it would have increased his beginning net worth or would have reduced it?

A. It would have reduced it.

Q. It would have reduced it—in what way, Mr. Kleven?

A. It says the cost there was $1,700.00 and I have given him $4,500.00,—purchase price.

Q. Doesn't the return also say "Subsequent costs of $10,377.78"?

A. It does, but it doesn't give any dates for those expenditures.

Q. I see. In other words, you could have checked it but you chose to ignore it?

A. I could have checked it?—I had nothing to check it with.

Q. Well, you made no investigation insofar as the facts were concerned in Government's Exhibit 4 regarding the stock in Wheel Service?

A. No, I think I made sufficient and diligent investigation.

Q. The $4,500.00 figure that you have for Item 40, Wheel Service, was not obtained from Government's Exhibit 4?

A. Will you repeat that?

(The question was read.)

A. That is apparent.

Q. Now, I direct your attention to Item 42, "Casablanca", and I think that you stated on your direct examination that you relied upon Exhibits 70 and 71, and the testimony of Mr. Weinstock, is that correct?

A. That is correct.

Q. Now, Mr. Kleven, when you testified with respect to this transaction on direct examination, did you use memorandums which had been prepared by you?

A. When I what?

Mr. Graff: May the reporter read it, please.

(The question was read.)

A. I don't recall.

Q. (By Mr. Graff.) We called attention to the fact this morning, did we not, Mr. Kleven, that when you were testifying you were using memoranda which had been prepared by you?

A. In going through the lines?

Q. Yes. A. Yes, I did.

Q. May I have your memorandum that you used in connection with Item 42, Casablanca?

A. (Witness produces document.)

Mr. Graff: May we just have a moment, Your Honor, to examine this page?

The Court: Yes.

Q. (By Mr. Graff.) Now, your memorandum indicates—

Mr. Landrum: Now, if the Court please, I didn't make any objection when he went and took the witness' memorandum away from him—

Mr. Graff: Just a moment.

Mr. Landrum: (Continuing.)—but I don't think he is entitled to that. This witness has used that to refresh his recollection. Now, if he is going to pick up all these memoranda, we will be here a long time, if Your Honor please, and I don't think counsel is entitled to take that memorandum and cross-examine him from it.

The Court: (To Mr. Graff.) You may use the memorandum.

Q. (By Mr. Graff.) Now, the memorandum that you used in connection with your testimony concerning Item 42 indicates that you used a liquidation statement prepared by Leonard Weinstock, is that correct?

A. In the investigation we discovered such a statement, which indicated a 52 per cent valuation for the largest stockholder.

Q. Now, does not the memoranda prepared by you refer to a liquidation statement prepared by Leonard Weinstock?

A. Yes, it does.

Q. And did you rely upon that liquidation statement in determining the amount of $7,800.00 which you entered for Item 42 as of December 31, 1943?

A. As to percentage, I did.

Q. And when you testified, did you not also testify that you used Exhibits 70 and 71?

A. Yes, I did.

Q. And in Exhibits 70 and 71 it is indicated that there were 90 shares of stock which were owned by Tom Banks, isn't that correct?

A. Yes.

Q. And it indicated that there were a total of 180 shares outstanding?

A. That is right.

Q. So that he owned 50 per cent of the outstanding stock of Casablanca, Inc., isn't that correct?

A. That is correct.

Q. And yet you used 52 per cent?

A. Yes, I did.

Q. And relied on the liquidation statement prepared by Mr. Weinstock?

A. Yes, sir.

Q. Did you make any personal investigation of this matter other than the examination of Mr. Weinstock's liquidation statement?

A. I did not examine it. Mr. McKusick examined it.

Proceedings had in the foregoing entitled matter before the Honorable Robert C. Bell on May 29, 1952. Appearances are as has been heretofore noted.

Q. According to my notes, Mr. Kleven, when we recessed last evening we were talking about Item 42, Casablanca, where you have the figure of $7800.00 as of the close of '43, '44, '45, '46 and '47. Do you recall that?

A. Yes, I do.

Q. And you indicated that you obtained that information from the testimony of Mr. Weinstock, in part, is that correct?

A. Yes, I obtained the acknowledgment from him that $15,000.00 was the total capital investment in Casablanca.

Q. So you regarded the figure of $7800.00 as the interest that this taxpayer had in the Casablanca for each one of those years, '43 to '47, inclusive, is that right?

A. Yes; may I explain that?

Q. Well, you regarded it that way—

The Court: You may.

The Witness: As you previously recall, this chart was prepared on Friday night and Mr. Weinstock testified on Saturday and we fully expected him to put in the evidence of 52 per cent—and he did not present that information on Saturday, although the $7800.00 is the correct figure. Your Honor, could I go down to the chart and show what effect that has?

The Court: Yes.

(The witness goes to the chart.)

The Witness: Whether this figure was $7500.00 or $7800.00, makes no difference in this chart because that figure remains constant all the way through. The only time that this would have any effect whatsoever in this case is if this figure was increased in 1945, '46 or '47. It has no bearing on the current case for the income for '45, '46 or '47.

Q. (By Mr. Graff) Or if it was decreased? A. Yes.

Q. Then you would have to change the figures on the chart?

A. Pardon?

Q. Then you would have to change the figures on the chart if it had decreased?

A. Under what conditions?

Q. If the figure had decreased.

A. If the investment had decreased, it would have to be changed, but according to the testimony of Mr. Weinstock, that corporation did not dissolve and the investment remained stationary.

Q. Now, are you talking about the legal dissolution of the corporation or the distribution of its assets?

A. The liquidation of the corporation, according to Mr. Weinstock, was not made.

Q. He said legal dissolution, didn't he?

A. I don't recall his exact words.

Q. But you took Mr. Weinstock's statement into consideration for the purpose of arriving at that figure of $7800.00 that you have for those years on Exhibit 225?

A. I took that into consideration.

Q. But you do not remember what Mr. Weinstock said?

A. I do not remember his words verbatim.

Q. Well, you do not appear to remember the effect of it. You just got through telling us that you did not know what he said, isn't that right?

A. I said I do not recall his words verbatim.

Q. Now, in connection with item 42, the Casablanca, would you turn to Exhibit 224 and have before you item 25?

A. (Witness complies.)

Q. Now, I hand you Government's Exhibit 215, and may I have the memorandum which you used in testifying with respect to Exhibit 224, item No. 25?

A. Yes, you may.

Q. Now, would you please examine Exhibit 215 and tell me whether the words "The Daily Mail" appear on that check?

A. The words "Daily Mail" do not appear on this check, but—

Q. Just a moment—

Mr. Landrum: (Interposing) Just a moment, let him go ahead and finish it.

Mr. Graff: I submit he has answered the question I asked him.

The Witness: May I explain that?

The Court: He does not have to stop with what he said if there is something more to make the data on that exhibit clear. (To the witness) You may continue your answer. We want all the testimony that is competent and relevant and material to the issues in this case. Proceed.

The Witness: Mr. Weinstock prepared a statement which he presented to us during the investigation, which indicated "Len Welsh—The Mail" and it also indicated on this statement that this check was drawn on October 31, 1947, as shown by this check. This statement that he prepared also showed that on October 30th, that he had received a $5,000.00 deposit in currency and that the following day this check was drawn, and during the testimony of Mr. Weinstock he indicated that Len Welsh operated "The Mail" and that this presumably was used for a loan or investment in The Mail.

Mr. Graff: Now, if the Court please, I move that that portion of the answer that has just been given by the witness be stricken as based upon hearsay and not responsive to the question.

The Court: The motion is denied.

Q. (By Mr. Graff) Now, you have on Exhibit 224 the item of $5,000.00 as receivable as of December 31, 1947?

A. That is correct.

Q. Now, if the $5,000.00 represented by Government's Exhibit 215 was a gift, it would not belong as a receivable on Government's Exhibit 224?

A. It would not be a receivable, but it would be an additional item of non-taxable deductions, which would increase his living expenses by $5,000.00, and that would have the same result as if it was a receivable.

Q. Mr. Kleven, I did not ask you what the result would be,—I simply asked you, if it was a gift it would not belong on Exhibit 224 as a receivable, isn't that correct?

A. That is correct.

Q. Now, you have no information whatsoever that it was not a gift, do you?

A. Well, according to Mr. Weinstock's testimony, it wasn't stated as a gift.

Q. What was there in Mr. Weinstock's testimony that indicated that this was not a gift?

A. He stated that this was drawn out of his trustee account for the benefit of Mr. Banks for Len Welsh, and Mr. Len Welsh did not appear to be an individual who would receive a gift from the taxpayer of this amount for not receiving some benefit for it.

Q. You just assumed, Mr. Kleven, that Mr. Welsh was not the kind of a person that somebody would give a gift to in that amount, is that correct?

A. Not for some reason.

Q. I beg your pardon?

A. Would not be giving it to him as a gift without any reason.

Q. I mean, that is your feeling on the matter, is that correct?

A. That is correct.

Q. Now, did you personally make an investigation to find Mr. Welsh?

A. I did not. That was done by Mr. McKusick.

Q. And you know that he made no investigation to find him either—at least he was unsuccessful?

A. I know that.

Mr. Lord: Which part of that question did you answer, Mr. Kleven, when you said "I know that"?

The Witness: I know that Mr. McKusick was unsuccessful in finding Mr. Welsh.

Mr. Lord: Well, now, the first part of that question, what is your answer to that, "You know that Mr. McKusick did not make a search for him?" What is your answer to that?

Mr. Graff: Just a moment. I submit this is cross-examination.

The Court: Well, you may answer that question. It was a double question like asking a man "If he had quit beating his wife."

Mr. Graff: Well, if the question is deemed to be improper, Your Honor, I will withdraw it.

The Court: (To the witness) You may answer the first part of the question.

The Witness: I know that Mr. McKusick made a search for him.

The Court: Very well, that answers the entire question.

Q. (By Mr. Graff) Now, did you take the $5,000.00 check, Government's Exhibit 215, into consideration in determining item 42 of Government's Exhibits 224 and 225?

A. No, I did not.

Q. And did you as a part of your investigation with respect to Government's Exhibit 215 find out when Mr. Weinstock got the funds which were represented by Government's Exhibit 225?

A. Yes, Mr. Weinstock furnished us a typewritten analysis of his trustee account in which he showed that this $5,000.00 in currency came to him the day before this check was drawn and indicated that it came from Tom Banks.

Q. And didn't that liquidation sheet that Weinstock showed you show other amounts also paid out to the taxpayer?

A. That particular analysis sheet showed receipts from Mr. Banks which were paid out for income tax purposes.

Q. Didn't the liquidation sheet that you referred to also show amounts paid out to Tom Banks by Leonard Weinstock?

A. This one that I am referring to did not, that I recall.

Q. Didn't you see the check of Len Weinstock payable to Tom Banks out of that account?

A. This account that I saw was not a liquidation statement. It was an analysis of his trustee account, not a liquidation statement.

Q. I see. Well, how many statements did you see from Mr. Weinstock, Mr. Kleven?

A. In the investigation I saw two of them.

Q. When you testified with reference to the Daily Mail or item 25, Daily Mail,—did you have in mind the liquidation statement?

A. You mean on Exhibit 215?

Q. That is right.

A. No, I do not have reference to the liquidation statement.

Q. Did you have in mind Mr. Weinstock's testimony in connection with that?

A. I think he testified that it came from a liquidation statement, but he testified erroneously.

Q. Oh, I see. In other words, your position is that he testified differently, but you figure that that was erroneous, and, therefore, you took your own impression of it, is that correct?

A. I am taking it from the facts as found.

Q. Didn't you come into court here and tell us that you made Exhibits 224 and 225 up from the exhibits in this case and the testimony that you heard in this court room?

A. That is correct, I did make it up from the information that I have obtained in court.

Q. And when it suited your purpose you discarded a certain amount of the testimony, is that correct, and took your own conclusions?

A. I am basing this on the facts that are correct, sir.

Q. Just answer my question.

A. I do not know if it was my conclusions or absolutely based on fact.

Q. (By Mr. Graff) Was it based on the exhibits and the evidence in this case?

A. Yes, it was based on Exhibit 215, check No. 109.

Q. And it was not based on evidence because you discarded certain evidence?

A. The testimony to the effect that this check was not repaid meant it was an asset as of December 31, 1947.

Q. But you discarded Mr. Weinstock's testimony, isn't that correct?

A. To what extent?

Q. In coming to the conclusion that that exhibit 215 in that amount of $5,000.00 for the Daily Mail should be listed as a receivable on Exhibits 224 and 225?

A. No, that is based upon the evidence in the court.

Q. (By Mr. Graff) Item No. 47, "National Plastics",—how did you arrive at the amount of $6,250.00 as of December 31, 1944?

A. This is going to require a detailed explanation and I would like to have Exhibits No. 11, No. 32 and 70 and 71.

(Exhibits handed to the witness by the Clerk.)

A. (Continuing) According to Exhibit 11, the taxpayer's tax return for 1947, he indicates a capital sale listed under "Partnership, Banks, Cary, Shepard, and Bortz,—cost $8,125.00; sale price $12,500.00; long-term gain, $4,375.00."

The cost of that stock is shown in this return as $8,125.00. Now, in Exhibit 32, which is a partnership return for Banks, Cary, Shepard and Bortz, for the year of 1947—this return lists acquisition dates of stock, Midwest Music, National Sound, and National Plastics, and for the years 1944, 1945, and 1946, there is a listing of about fifteen different acquisitions of stock. The numbers of shares are listed under each of these acquisitions, but the costs are not, and also the investment by each of the individual partners of Banks, Cary, Shepard and Bortz is not listed for any one of these particular dates. At the bottom of this sheet it just shows the total

investment. It does not say from whom or what year that was acquired. During the investigation we asked for the books and records of this partnership and the only record that was available was a sheet similar to this one in the partnership return, which gave no details as to dates of acquisition or costs of the individual shares. Back in 1947 the Intelligence Unit requested a special agent in New York City to make an investigation on this stock. He contacted—

Mr. Hoffmann: (Interposing) —Just a moment, if the Court please.

The Court: Yes, do not tell what he said to you. That would be hearsay.

Mr. Graff: This witness has testified, Your Honor, that he got these figures from the testimony and exhibits. Now, he is talking about some agent in New York,—obviously improper.

The Court: Very well, he is not going to give any improper testimony in this case, if the Court can prevent it. Just leave out any hearsay that may have come to you. Proceed with your answer if you are able to do so from there.

A. (Continuing) May I go down to the chart again?

The Court: Yes.

A. From this evidence included on this partnership return which shows acquisition dates in '44, '45, and '46, we refer to that as being accumulated one-third each approximately in 1944, '45 and '46, and that yould mean two-thirds of that income would be in these years. But we have given the taxpayer the benefit of the doubt in this case and only charged him with $1875.00 in '45, and set this up, which is the first year, and this is important in this prosecution, and we have set up the largest portion in 1944, which is not effective in this case.

Q. (By Mr. Graff) Is there anything in evidence, Mr. Kleven, that shows that that figure of $8,125.00 should not be the figure as of December 31, 1944? You can answer, I think, one way or the other.

A. Yes, the return shows acquisitions,—the partnership return shows acquisition of this stock in '44, '45, and '46.

Q. Does it show the taxpayer's name in connection with those acquisitions at that time?

A. It does not show any distribution to any individual nor does it show the cost on any one of the dates.

Q. Therefore, it is your conclusion that the amount should be such. You cannot base it and justify it by an exhibit in evidence?

A. The conclusion would be reached from the four partners' acquisition dates in each of the three years.

Q. That is your conclusion, is it not, Mr. Kleven?

A. That is correct. If there was a fairer way of distributing that, I would be very glad to know.

Q. (By Mr. Graff) Now, with respect to Item 61, which is "4400 East Lake Street", you testified in connection with that transaction that there were some forty acres of land in Anoka County that were part of that transaction, isn't that correct?

A. That was testified to.

Q. Isn't it a fact, Mr. Kleven, that you did not include the value of this Anoka County land on the chart on Exhibit 224 or 225 at any place?

A. May I go down to the chart?

The Court: Yes, you may point it out.

(The witness stands by chart.)

Q. (By Mr. Graff) May I amend the question: Prior to the acquisition of that Lake Street property?

A. The date of acquisition of that little piece of property that you are discussing would have no effect on this line because this is the same all the way across,—no increase in the years of prosecution.

Q. Mr. Kleven, my question was very simple: Are those 40 acres of land in Anoka Township listed on Exhibits 224 and 225 before the acquisition of 4400 East Lake Street?

A. No, they are not on it.

(Witness returns to the stand.)

Q. The first time that item 65, "Hungry Jack Lodge" appears on Exhibit 225 is as of December 31, 1941, is that right?

A. Yes.

Q. The investigation revealed that the taxpayer had that property prior to that time?

A. I do not believe so. My understanding if it was that first date on which the taxpayer had a lease for that land and the permit to use that land was in 1939, and that is also a similar asset which is the same all the way through, the whole period, and it would make no difference in this prosecution case.

Q. If your understanding was that the property was acquired in 1939, is it shown on Exhibits 224 and 225 as an asset as of the close of the year 1939 or the close of the year 1940?

A. It is shown as at the end of 1941, which would also include the prior years that you are discussing.

Q. You do not show it as of 1939, do you?

A. '39 is not included on the chart, as previously explained.

Redirect Examination

By Mr. Landrum:

Q. Mr. Kleven, in connection with his cross-examination of you, counsel has asked you with relation to the line involving Casablanca, has he not?

A. Yes.

Q. He has asked you with relation to the line involving "Cities Service", has he not?

A. Yes.

Q. He has asked you with relation to the line involving "Flour City Body", has he not?

A. Yes.

Q. (By Mr. Landrum) He has asked you with relation to the line involving the "Blue Goose Resort", has he not?

A. I do not recall that, Mr. Landrum.

Q. Well, all right. He has asked you with relation to the line involving "4400 East Lake Street", has he not?

A. Yes, he has.

Q. He has asked you with relation to the line involving "Hungry Jack Lodge", has he not?

A. Yes, sir.

Q. State whether or not the figures on that chart with relation to all of those lines carry the same figure all the way through?

A. Yes, they do.

Q. Now, will you be good enough, just to clear this matter once and for all, to step over here with me to this chart and explain to this jury your statement to the effect that insofar as this prosecution is concerned, that that makes no difference. Now, explain it very carefully.

Mr. Hoffmann: Now, if the Court please, I do not like to play with words, but I do not understand the District Attorney's statement "insofar as this prosecution is concerned."

Mr. Landrum: That is what the witness said.

Mr. Hoffmann: Just a moment. If the Court please. I submit that is not properly a part of any question. I have no objection to the substance of the question, but the wording of it, I think, is improper.

The Court: Well, I suppose he means by that question whether a change in those figures would change the ultimate result so far as the calculation of the tax is concerned in this case. That is my understanding of the meaning of that question.

Mr. Landrum: That is exactly it, Your Honor.

The Court: Well, now, you may answer that question. You may tell why there would not be any change so far as the calculation of the tax is concerned.

The Witness: There would be no change in the calculation of income or tax for the years 1945, 1946 or 1947, for any of those lines mentioned because these assests have not increased the net worth for any of those years.

Q. (By Mr. Landrum) That is what we are concerned with, the increase in net worth from year to year, are we not?

Mr. Hoffmann: Just a moment, if the Court please. This is a Government witness. We submit that the District Attorney remember that and ask questions that are properly direct or redirect questions, and that the District Attorney not testify.

Mr. Landrum: Yes, Your Honor.

The Court: Very well, just proceed with the examination of the witness.

Q. (By Mr. Landrum) Now, Mr. Kleven, counsel on cross-examination asked you, did he not, to name the exhibits which led you to hold that Mr. Banks had no cash on hand in 1936,—did he not?

A. Yes, he did.

Q. Now, will you please tell us what exhibits you used in arriving at that conclusion and what those exhibits showed?

Mr. Hoffmann: If the Court please, we object that this is repetitious. This is a matter already inquired into by the Government on direct.

The Court: I am not sure that it has been covered on direct. You may answer.

A. I used Government's Exhibit No. 33 and Government's Exhibits 70 and 71. Government's Exhibit 33, which

was used by the taxpayer in settling a tax liability in 1937, listed "No cash," and that was used as the basis for a settlement with the United States Government. And in Government's Exhibit 70 Mr. Banks was directly asked—

"Question 1: How much cash did Mr. Banks have on hand July 2, 1937?"

And his answer was completely omitted. And under Question B: "How much cash did Rita Banks have on hand July 2, 1937?"—the answer was completely omitted. He was also asked, "How much cash in the possession of Thomas W. and/or Rita L. Banks as of December 31, 1947?"—in Question No. 20, and his answer was completely omitted.

Mr. Landrum: If Your Honor please, we feel very probably that this may be the last witness which will be presented to the Court at this time by the Government. If Your Honor will recall, in the beginning of this matter there were certain motions presented to the Court and before we rest, we would like to present to Your Honor certain evidence in connection with one of those motions for the consideration of the Court: We feel it is a matter for the Court alone and we would like to present that now, if we might.

The Court: (To the jury) Gentlemen of the jury, you may retire to the jury room and await the call of the Bailiff.

(Whereupon the jury retired from the court room.)

The Court: You may proceed, counsel.

Mr. Landrum: Your Honor will recall that in Chambers prior to the time we began the introduction of testimony in this case, one of the motions which was presented to Your Honor was for dismissal upon the ground and for the reason that the action, insofar as it involved the year 1945, was outlawed in that the statute of limitations had

run against it, and at that time counsel said that that matter would be further deferred until the evidence was adduced. The situation, as I view it now, is that they have had one witness on this witness stand, Mr. Weinstock, who has testified that he prepared the income tax return for this defendant for the year 1945. He was shown it and he was shown the date upon that exhibit, which I believe was January 11, 1946. The indictment in this case was returned on January 14, 1952. That being in evidence here by virtue of the testimony of Mr. Weinstock that he put it in the mail on the same day that he dated it, and while, of course, we do not concede that the placing in the mail of an income tax return would start the Statute to running, yet in order that this matter may be entirely clear, we ask the Court to permit us to present testimony from the Court's own records on that question; and in that connection, if Your Honor please, we ask the Court to take judicial notice of its own files and records, and within it own files the Court will find a complaint filed with Mr. Eckley, United States Commissioner, on the 10th day of January, 1952, and a warrant, which was duly issued pursuant to that Complaint, upon which there has been no return made by the United States Marshal. However, if Your Honor please, in order that the record may fully show that situation, may I ask Your Honor to look in the file and, if you find such instruments, to let me have them. It is my purpose to put them in evidence in this case.

Mr. Landrum: At this time, if the Court please, the Government offers in evidence Government's Exhibits 228 and 229, for identification by the Clerk, as being the actual records of this Court.

Mr. Hoffmann: (To Mr. Landrum) Do we understand that your offer is made of these exhibits on the basis of their being part of the jury's consideration?

Mr. Landrum: No, sir.

Mr. Hoffmann: Solely for the purpose now of the Court's determination of the motion?

Mr. Landrum: That is agreeable.

Mr. Hoffmann: I am sorry, Your Honor. I should have said this to the Court. As I understand it then, Your Honor, the Government's offer of the proposed exhibits is not on the basis of these exhibits becoming a part of the record as exhibits for consideration by the jury, but they are offered by the Government for the purpose of their being submitted to the Court in the Court's determination of the pending motion.

The Court: That is correct. That is the reason why the jury was excused and that this proceeding might take place out of the hearing of the jury.

Mr. Hoffmann: Yes. I was mindful of that, Your Honor, but I merely wanted the marking of the exhibits, so far as the record is concerned, to show the purpose of their being marked as exhibits.

The Court: What are the exhibits now?

(Exhibits handed to the Court.)

WILLIAM H. ECKLEY called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

My name is William H. Eckley and in January, 1952, I was deputy clerk, United States District Court and was a United States Commissioner for the District of Minnesota. As such United States Commissioner there was filed with me a complaint relating to one Thomas Banks. In connection with my duties as United States Commis-

sioner, I keep a docket and I have with me the entries pertaining to that particular action. They are in the regular criminal docket of the Court following the case. After a matter is terminated they are returned into court and are placed into it. Exhibit 230 is the Commissioner's transcript or docket of the proceedings in criminal cases before the United States Commissioner. (Exhibit 230 is offered and received in evidence.)

Cross Examination

The entries on Exhibit 230 were made on January 10th as reflected on the sheet. The warrant was not served and there is no return by the Marshal attached to the warrant.

(The following proceedings were had in open court:)

Mr. Landrum: If the Court please, the Government rests.

The Court: Mr. Graff.

Mr. Graff: If the Court please, there are certain matters at this time we wish to take up with the Court and they will have to be taken up out of the hearing of the jury. I assume they will take some time, Your Honor.

The Court: Gentlemen of the jury, I think you may remain seated. I anticipate that the matters that will be presented to the Court will take a very short time. Court will then reconvene and we will proceed.

I will hear counsel in Chambers. Those in the court room will keep your seats, or retire, of course, if you desire.

(The following proceedings were in the Court's chambers:)

The Court: I will hear your motions.

Mr. Hoffmann: If the Court please, at this time the defendant moves to strike from the record and to order out

of the record as exhibits certain government exhibits heretofore offered and received. The defendant now moves to exclude or strike out as an exhibit in this case Government's Exhibit 1, the 1937 return of the defendant; Exhibit 2, the 1938 return of the defendant; Ex. 3, the 1939 return of the defendant; Exhibit 4, the 1940 return of the defendant; Exhibit 5, the 1941 return of the defendant;—may the record show when I use the word "return" I am talking about income tax return,—Exhibit 6, the 1942 return of the defendant; Exhibit 7, the 1943 return of the defendant; and Exhibit 8, the 1944 return of the defendant;—for the reasons and on the grounds heretofore stated as objections to all of the exhibits, and on the further reason and for the further ground now that the Government has by its withdrawal of Exhibits 12, 13, 14, and 15, demonstrated the immateriality and irrelevancy of Exhibit 1 to 8, inclusive.

The defendant now moves to strike, on all the grounds heretofore stated and upon the present ground, that the materiality and relevancy are not established, the following exhibits: Exhibit 16, being the 1942 tax return of Rita Banks; Exhibit 17, being the 1943 return of Rita Banks; Exhibit 18, being the 1944 return of Rita Banks; Exhibit 19, being the 1945 return of Rita Banks; Exhibit 20, being the 1948 return of Rita Banks; Exhibit 21, being the 1947 return of Rita Banks.

At this time the defense moves, on all the grounds taken as objections to their receipt at the time the exhibits were offered, that Exhibit 26 of the Government be stricken and ordered out as part of the record in this case,—Exhibit 26 being the 1946 return of Rita Banks and Harry Shepard.

On the same grounds heretofore stated as objections to its receipt, the defendant moves at this time that Exhibit 27 of the Government, being the tax return of Rita Banks and Harry Shepard bearing upon the year 1947, be stricken from the record in this case.

At this time, Your Honor, the defendant moves to strike from the record, on all the grounds heretofore stated and upon the further ground that the testimony of the Government itself demonstrates its falsity, Government's Exhibit 33.

At this time, Your Honor, the defendant moves to strike from the record and to exclude as part of the record Government's Exhibits 70 and 71, upon the grounds heretofore stated into the record as objections to their receipt and upon the further ground that the evidence adduced by and in behalf of the Government's case does not now establish their relevancy and materiality.

The Court: Those are the questions and answers?

Mr. Hoffmann: Yes, sir.

At this time, Your Honor, the defense moves to strike from the record and to order out as an exhibit in this case Government's Exhibit 80, being the ledger sheets of the bank account at the First National Bank of Anoka, on all the grounds heretofore stated as objections to its receipt.

At this time, Your Honor, the defense move to strike from the record and order out as part of the record in this case Government's Exhibits 95, 96, 97, and 98, all of which, Your Honor, bear upon the ownership of certain Government Bonds by Rita Banks and/or Tom Banks, for all of the reasons heretofore stated as objections to the receipt of said exhibits.

At this time, Your Honor, the defense moves to strike as part of the record in this case and to remove as one of the exhibits in this case, Government's Exhibit 218, bearing upon the partnership of Banks and Shepard, on all the grounds objected to at the time of its offer.

At this time, Your Honor, the defendant moves to strike from the record and to remove as one of the exhibits of

record in this case Government's Exhibit 222 on all the grounds stated at the time as objections to its receipt, and on the particular ground and further ground at this time that the testimony of the witness was part of whose testimony this exhibit was received,—that it is now demonstrated that the same is not the best evidence and that the necessary foundation for the failure to produce the first and primary evidence was not adduced.

At this time, Your Honor, the defendant moves to strike from the record and remove from the record as an exhibit in this case, Government's Exhibit 221, on all the grounds heretofore stated in the record as objections to the receipt of the exhibit and on the particular and further ground that it is now demonstrated that the same is not primary evidence, but pretends to be, as by the testimony of Mr. McKusick—witness for the Government—was testified, his interpretation or analysis of certain records that were not here produced, and it is claimed by the defendant that the receipt of this exhibit, its use and testimony concerning it, prejudicial and greatly prejudicial to the rights of the defendant because it permitted the Government witness to use his own preparation, which, according to his own testimony, was in error and was not reflective of any books here received in evidence. We want the record itself with respect to this motion as to Exhibit 221 to be clear that we still contend the necessary foundation for the production and receipt of secondary evidence was not established.

At this time, Your Honor, the defendant moves to strike from the record and to remove from the record as exhibits, Government's Exhibits 224 and 225, for the reasons and on the grounds stated as objections at the time they were offered and received, and on the further ground that it is now demonstrated by the testimony of the witness Mr. Kleven in behalf of the Government's case, that the following represents the basis of his computations or pre-

paration: All of the testimony in the case, his interpretation of the testimony in the case, his acceptance of certain testimony in the case, his rejection of certain testimony in the case,—as he, the witness, determined to accept or reject any or such testimony,—upon all of the exhibits in the case, upon the conclusions he formed, and upon, may the record show, the conclusions of his associates—and may the record show it is our contention that his testimony did not even disclose the identity of the said associates—and from other information.

We also move to strike Exhibits 224 and 225 on all the grounds stated in chambers as objections to their offer and receipt, and upon the particular and further ground that the receipt by the Court of such exhibits could have but one effect upon the jury, and that was to inflame and impassion the jury.

Mr. Graff: At this time, if the Court please, the defendant respectfully moves the Court to dismiss the three counts of the indictment returned against this defendant on the ground and for the reason that the evidence so far adduced, both testamentary and documentary, fail to prove that the defendant violated the section of the statute specified as 26, United States Code, Section 145 (B).

We submit, Your Honor, this motion on several grounds: First of all, the motion is made for an acquittal under Rule 29 of the Criminal Rules of Federal Procedure. The testimony in this case, Your Honor, has utterly failed to meet the degree of proof required to make out a violation of 145 (B), which statute is a felony and which requires that there be proof, before the case can be submitted to the jury, that the defendant willfully and knowingly attempted to defeat and evade a large part of his tax due for each of the three years, '45, '46, and '47. We submit that the evidence which has been adduced in this case falls far short

of the degree of proof necessary to make out a case under this statute.

The evidence in this case, if the Court please, has been circumstantial, and while we have no quarrel with the circumstantial evidence rule, as this Court very well knows, before a conviction can be warranted upon circumstantial evidence, all the facts and evidence must not only be consistent with the guilt of the accused, but they must at the same time be inconsistent with any rational theory of his innocence. We submit that, on the basis of the evidence in this case, to submit this case to the jury for alleged violations of Section 145 (B), of 26 United States Code, would permit this jury to speculate and not have any verdict which they might return based upon evidence.

We should like to point out to the Court in connection with this motion for an acquittal that if the testimony in this case establishes anything, it only arises to probably establish a violation of 145 (A). It might also conceivably establish, sufficiently to go to the jury, a violation of 3614 of the Internal Revenue Code. However, the defendant has not been indicted under those particular sections. He has been indicted under 145 (B), and we respectfully submit that the evidence in this case falls far short of the degree of proof necessary to make out a case upon which a jury could reasonably base any verdict returned.

The Court: Do counsel for the Government desire to state their position?

Mr. Landrum: Well, I do not know that there is anything that I should say. I am thoroughly convinced that Your Honor is fully familiar with the law and it would not be necessary for me to cite any law to Your Honor. Insofar as those exhibits are concerned, of course, we hold that they are perfectly competent; and insofar as the motion to dismiss is concerned, it is elemental that a man

must intend his acts, and there is plenty of law on this question of wilfulness, so that there isn't anything that I feel the Government should say in response, Your Honor.

Mr. Graff: Your Honor, I meant to include as a part of my motion,—and I did not want to interrupt Mr. Landrum. I also wish to point out as part of our motion for acquittal, that in our opinion the Government has failed to establish a satisfactory starting point for the so-called net worth case, and, having so failed, they have not met and cannot meet the circumstantial evidence rule which would require the evidence to be consistent with guilt and inconsistent in every respect with innocence.

The Court: Well, there are some questions that come to my mind pertaining to this case, but I think there is no occasion for me to go into them at this time. I do feel that the situation is such and the evidence in this case is such that the case should be submitted to this jury and let them pass on the facts. Consequently, the motions are overruled and an exception is allowed.

(Whereupon the following proceedings were had in open court:)

Mr. Graff: If the Court please.

The Court: Mr. Graff.

Mr. Graff: The Government now having rested, the defendant rests.

The Court: Gentlemen of the Jury, you have just heard that both parties rest. That terminates the testimony in this case. You may retire to the jury room, or to your hotel and await further instructions.

(Whereupon the jury retired.)

Do you have something further?

Mr. Graff: Yes, Your Honor. I have very short motions to make, Your Honor, and I think I could make them right here.

The Court: Very well, you may proceed.

Mr. Graff: If the Court please, at this time the defense renews all the motions which were made at the end of the Government's case, with the same force and effect as if they were fully repeated here.

The Court: The motions are overruled.

The following requested instructions were submitted to the Court on May 29, 1952.

(Caption of Action)

DEFENDANT'S REQUESTED INSTRUCTIONS

The defendant respectfully requests the Court to give the jury in the above-entitled action the requested instructions following.

Dated this 29th day of May, 1952.

JOHN W. GRAFF
JEROME HOFFMANN
RICHARD E. KYLE
Attorneys for Defendant

REQUESTED INSTRUCTION NO. 1

For proof of its case, the government relies upon circumstantial evidence. Circumstantial evidence consists of facts proved from which the jury may infer by process of reasoning certain ultimate facts. A conviction may be had upon circumstantial evidence, but to warrant a conviction on such evidence the proven facts must not only be consistent with the hypothesis of guilt and point surely and solely in the

direction of guilt, and must clearly and satisfactorily exclude every other reasonable hypothesis except that of guilt.

REQUESTED INSTRUCTION NO. 2

To warrant a conviction upon circumstantial evidence, the facts proven must not only be consistent with the guilt of the accused, but they must also be inconsistent with any rational theory of his innocence. It is not sufficient that the facts coincide and render probable the guilt of the accused, but they must exclude every other reasonable hypothesis and must exclude the hypothesis of innocence.

REQUESTED INSTRUCTION NO. 3

The jury is hereby instructed that the defendant in this case is presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt and if you have a reasonable doubt of his guilt, you must acquit him.

REQUESTED INSTRUCTION NO. 4

The jury is instructed that in criminal cases guilt must be established beyond a reasonable doubt and the burden of establishing such guilt rests upon the government. The law does not require of the defendant that he prove himself innocent, but the law requires the government to prove the defendant guilty in the manner and form as charged in the indictment beyond a reasonable doubt and unless they have done so, the jury should acquit.

REQUESTED INSTRUCTION NO. 5

The defendant is presumed to be innocent until his guilt is proved by competent evidence which is produced against him, and this presumption of innocence remains with him throughout the trial and applies to a consideration of each and every one essential element going to make up the offense as charged.

REQUESTED INSTRUCTION NO. 6

The burden devolves upon the government that presents this charge of meeting the presumption of innocence and overcoming it by competent legal proof and the degree of proof which the law establishes as the standard is that his guilt must be shown beyond a reasonable doubt. The defendant cannot, therefore, be convicted of the offense charged in this indictment unless and until each and every element of the offense has been established by legal competent evidence that satisfies you beyond a reasonable doubt.

REQUESTED INSTRUCTION NO. 7

A reasonable doubt may arise from the evidence or it may arise from the lack of evidence.

REQUESTED INSTRUCTION NO. 8

You are the sole judges of the facts and you are also the sole judges of the credibility of the witnesses. You are not to accept the testimony of witnesses simply because it is sworn to and follow it blindly wherever it may lead you. The law anticipates that you take all of this testimony, examine it and scrutinize it in order that you may determine where the truth lies.

REQUESTED INSTRUCTION NO. 9

If you find that during this trial any witness has willfully testified falsely regarding any material matter, then you are at liberty to disregard his entire testimony except insofar as it may be corroborated by other credible testimony.

REQUESTED INSTRUCTION NO. 10

The burden of proof as I have already informed you rests upon the government and in determining whether it has sustained the burden of proof, you should take into consideration the conduct of the witness upon the witness stand; the manner in which they have given their testimony; the candor

or lack of candor; their frankness or lack of frankness; the reasonableness or unreasonableness of their statements; the opportunity or lack of opportunity of knowing that about which they testified.

REQUESTED INSTRUCTION NO. 11

In this case the government relies on a claimed increase in the defendant's net worth in the years 1945, 1946 and 1947 to prove claimed unreported income during said years. The government's case must fail if the claimed net worth of the defendant at the starting point of the periods in question is not correct and has not been established beyond a reasonable doubt. A correct starting point must include all of the defendant's assets at that time as well as all of his liabilities. It is also incumbent upon the government to exclude any reasonable probability that the increase in net worth is attributable to capital assets or accumulations by the taxpayer in periods prior to the starting point of the net worth period in question.

In addition to establishing a correct starting point, it is incumbent upon the government to prove beyond a reasonable doubt the defendant's net worth for each year from the starting point up to and including the year 1947.

REQUESTED INSTRUCTION NO. 12

Where a specific intention is required to make an act an offense such as in the charge against the defendant, the doing of the act does not raise a presumption that it was done with that specific intent. The intent must be established from the facts and circumstances established by satisfactory evidence during the trial of the case.

REQUESTED INSTRUCTION NO. 13

The defendant is charged with having willfully and knowingly attempted to defeat and evade the payment of a substantial portion of his income tax as set forth in the indict-

ment. Before you can find a willful and knowing attempt to defeat and evade a substantial portion of his income tax, it is necessary that you find that he made some affirmative, willful attempt or attempts to accomplish such evasion and defeat.

REQUESTED INSTRUCTION NO. 14

The jury is instructed that there is no provision of law prohibiting a person from transacting his business by use of currency instead of bank checks, and neither is there any provision of law that requires any person to carry on his business or any transaction through the use of bank checks or banks.

Proceedings had in the foregoing entitled matter before the Honorable Robert C. Bell on May 30, 1952. Appearances are as has been heretofore noted.

The Court: Gentlemen of the jury, we are steadily making progress—sometimes I think very slowly, but surely, I will say that to you.

Counsel may proceed with the argument of this case.

ARGUMENT

By Mr. Lord

Mr. Lord: Judge Bell, and gentlemen of the jury: The evidence in this case is in and the job remains for counsel to explain to you their respective theories in this case. Now, what you are going to be called upon to determine I believe has previously been explained to you. It is whether or not Thomas W. Banks willfully and knowingly filed a false and fraudulent income tax return by understating the amount of his income. How has the Government gone about trying to prove what he has done? They have gone about doing it by a method in which they were required to proceed because of the nature in which Mr. Banks handled his affairs. We

have used the so-called "net worth" system. Now, Mr. Banks never showed any personal books. The agents were never able to locate the books of that middleman of all these enterprises, Thomas Banks.

You have seen in evidence here books of many business ventures,—apparently on their face well kept by competent accountants. You have heard Mr. Weinstock testify, and you have heard witness after witness testify 'I know nothing about these books,—Mr. Weinstock kept the books. Mr. Brancheau kept the records of the little enterprises which he participated in.'

Now, there is another reason why we have had to use the net worth system here and that is obvious from reading the income tax returns signed by this defendant. In the year 1945, on a statement in his income tax return showing the sources of income, Mr. Banks has $15,422.47, "Wagering" —net gains. He has a little figure that will appear here with amazing regularity, "Miscellaneous fees and commissions, $2,000.00."

You will recall that when some particular item of income we found hadn't been reported, the witness—and I have forgotten just what witness it was—said, "Oh, there is a $2,000.00 figure in there that will cover that."

Now, it is not possible to figure just how many miscellaneous items will fit into a $2,000.00 figure.

In the year 1946, Mr. Banks reported $23,000.00 as the balance of winnings in wagering. He reported miscellaneous income of $2,000.00. No source is given as to where this income came from,—no source of the miscellaneous income. With $23,000.00 and $2,000.00, approximately $25,000.00 of a total of $31,000.00 came from gambling and miscellaneous sources.

Much the same applies for the year '47. In the year '45, as I stated before, the income of $15,000.00, plus $2,000.00, or approximately $17,000.00 is out of a total of $22,000.00.

Now, the Government has proceeded to find out what this man really earned and we did it by adding up everything he owned and taking away from it everything that he owed anyone. Well, of course, to that figure we have added what it cost him to live. Now, ordinarily, as to a person's living —say a man earns $5,000.00 a year, he lives up about $4,500.00 and maybe he saves $500.00. Well, you can't say that because he only has $500.00 at the end of the year that that is all he earned. No, he earned what it cost him to live. On top of that he earned what he saved, and then if he paid out some income taxes, that goes on top and makes his earnings for the year the total of all of those figures, and that is what we mean when we say an increase in net worth for a year.

A man is worth one figure at the beginning of the year. He is worth on top of that what he has lived up, what he has used up in living, what he has paid in Federal income taxes, and what he saved. The difference is his income for the year under the net worth system.

Now, the Government doesn't propose that the net worth system is an exact, precise, penny for pennyway of measuring a man's income, but it is the most satisfactory way of arriving at a man's income under the type of circumstances which you see here where we don't have a better place to look. We are forced to go around and come in the back door.

Now, I think that you have seen what happened here. I could probably explain it better by stepping over to the chart here and talk to you in terms of years. Now, 1944 is really the base year. That is really the year where we start out, with a solid figure here made after about eight or ten years of research and of analysis of this man's income.

Now, you are going to hear a lot of talk about what happened over here in 1936 and whether a little extra money

came in here and disappeared, or what might have happened to it, but the year to keep your eyes on is the year 1944, and any of these figures that start over in here before '36 and run the same all the way across, for our purposes you can disregard them because they neither increase or decrease the amount of this man's net worth.

Now, let's see, where did the Government find the sources of their information? Let's start where they started investigating. They started investigating way over in here (indicating right side of Exhibit) and they were able to go back as we would now go back two or three years and get a pretty good picture of this man's financial activities, so that they could see this increase in net worth. Then to make this solid, to make it so nobody is going to question and say, 'Oh, I had accumulated funds over in here (indicating), which I now have invested and you see that in the way of an increase in net worth.' — they said, 'We will go back here to a point where we can find this man just didn't have any funds and then we will start in and see what the picture looks like.'

So they found an affidavit which this defendant had filed with the Federal Government, expecting the Federal Government to rely on it and to forgive a certain portion of an indebtedness, — signed under oath. His assets are listed. There is no mention there of cash. There is no mention there of anyone owing him any money from prior years. He didn't say in 1937, "John Jones owes me so much money that I hope I will get some day." — he didn't say a word about anything of that kind.

He listed his assets. Later in the investigation the agents wanted to be sure that they were right, be sure that they were fair with this man. "How much cash did Mr. Banks have on hand July 2, 1937?" Answer: (No answer.)

"How much cash did Rita Banks have on hand July 2, 1937?" (No answer.)

Even assuming, — yes, even assuming that he had some cash on hand in fairly substantial amounts, in a moment I will show you on that chart where we think it must have gone, and it is the Government's contention that the net worth starting point in this case, the point that is important as far as accuracy is concerned, is 1944.

Now, what kind of evidence did the Government use in this case? Let's just take a brief look at it: Bank records, records of stockholders, U. S. Government bonds redeemed, that are here in evidence, — a couple of inches thick of cancelled certified Government Bonds. Line 10, "Rubin Shetsky," — the man's own admission to the tune of $5,000.00. "H. G. Lee" on line 11, — the man's own admission. "O'Connor note," — the records of the Probate Court in Hennepin County for $3,000.00. "Quality Drug" — he answered that and admitted that in the questions and answers. "T. E. Ewing," — $10,000.00 admitted in the questions and answers.

Now, you have heard counsel say, "Well, how do you know Mr. Ewing didn't pay that money back?" — Mr. Ewing didn't take the witness stand and say whether or not he still owed the money. Mr. Ewing isn't in court. The question itself gives you the answer. The questions and answers contain the answer to why that $10,000.00 is still outstanding.

The "Ring Construction Company," a reputable Minneapolis firm, came in and testified as to $2,000.00. "F. J. Wickers" came and showed the checks which represented money which he had repaid to the defendant and his wife representing loans. "Robert Schuettler," — you will remember the fellow with the broken leg who came in and testified as to $10,000.00. "Walter Halvorson," the man from Grand Marais, came and stated how he borrowed money to build or to buy a house. "Brady's Bar," — well, this is one where we didn't have the books and records made available to us. We put a transcript in where the agents had seen those books and records before.

"Pearson's News Service," — from the books and records of that company (indicating). "Blue Goose Resort, Inc." — the books and records and his own venture show what his income was.

Have we come to anything questionable there as yet? This looks like merely a problem of addition. "McCarthy's Cafe" — from the books and records, and Mr. McKusick's analysis, which counsel has seen fit to question.

Mr. McKusick made an analysis, you will recall, where he went down and he added up everything that was in Rita Bank's name and he threw everything else out and came up with a figure at the end that represented $25,000.00 as being an investment from the sale of some National Plastic shares. That $25,000.00 represented what Mr. McKusick saw on those books at the time he examined the books. Subsequent to that time, Mr. Harry Clark, or Mr. Shepard — Mr. Shepard claimed that he owned half of that $25,000.00. So the agents forgave Mr. Banks for $12,500.00 there at that point.

Let's go some more through this evidence here, through what the Government has used, and see how doubtful is this case. The Flour City Body Corporation, — you remember Mr. Toensing brought the books in. He didn't know anything about them, but the agents examined the books. This is what they found (indicating).

The Daily Mail check, which is here in evidence and about which Mr. Weinstock testified, given close to the end of that year. Counsel would like to say or infer that that check was paid back, but I think that the jury is free to draw their own conclusions as to what happened to that money.

Merchants Distilling, from the records of Jamieson and Bishop. The same for Gillette Safety Razor, Northwest Airlines, and the Mohawk Liquor Corporation — I confess I have forgotten just where that came from.

The Insull Utilities, from the taxpayer's own affidavit, on which the Government relied.

The Cities Service — there is some dispute over the amount there as to whether it was actually on that affidavit or the agent gave him credit for the actual acquisition cost. That runs all the way through. It is immaterial; it doesn't make any difference to the issues in this case.

Banks and Shepard, — we have only the agent's versions of what was on those books. The books were not produced.

Coin-A-Matic Amusement Company, — the same situation prevails. McCarthy's Cafe, — we took that right from the books. The B. & S. Company, — no books available. We had to take the agent's versions of what was on those books. We can't be frustrated by the mere fact that books are not available when we had agents who have transcribed from those books and who have told us that they have accurately written down what they saw.

Again, the Flour City Body Corporation, — from the books. Power Brake and Equipment Company, the same. The Blue Goose Resort, and Wheel Service — you can go on down here. Koolaire, — a reputable Minneapolis business man in here testifying as to his business records; and Budweiser Tavern was admitted in the man's own affidavit.

Now, let's look at this Casablanca line here (indicating). There may be a slight question as to this line, whether it should be $7,500.00 or $7,800.00. I might say that we can all read — it doesn't make a bit of difference. We are charging this man with the increase in his net worth in '45, '46, and '47. Now, it would make a little bit of difference in the increase in net worth in the year of 1943. We will see more of that later, but he is not being charged with anything that occurred in 1943.

The Anoka Farms (indicating) — it all came right off his own income tax returns. The other property came from deeds, records, — it came from public documents.

"Mortgages Payable" came from public documents and from the accou ts of lenders who brought in their books and records and pre.ented them to us here in court.

There is a significant part of this I would like to call your attention to. Notice how the Mortgage Payables go down. Doesn't this seem to indicate that over in the years '36, '41, and '42 the defendant owed more money? We say he increased his net worth, he owed less money and owned more property. You see, that pattern is quite obvious right there (indicating).

Now, the "Loans and Accounts Payable" — Harold H. Banks, the defendant's own brother, testified as to one loan. The First National Bank, Anoka, — the books and records of the Flour City Body Corporation (indicating), — all those totals have been added together showing what his wealth is. Subtract from that what he owed (indicating), and you come out with his net worth at the end of each of these years.

Now, as we have explained before, you add on the living expenses, add on the Federal income taxes paid, and now I would like to direct your attention down to the two lines, the second from the bottom and the bottom line. They are the lines which I think you gentlemen of the jury will have time to refer to again and again. Let us skip this period '36 to '41, (indicating), except to say that that represents four years where he reported — it represents '37, '38, '39, and '40, where he reported $22,000.00, where the Government's findings show that he should have reported $45,000.00.

In the year 1942 he reported $14,000.00; the Government's evidence shows that he should have reported $48,000.00.

In 1943 he reported $21,000.00; the Government says he should have reported $94,000.00. Can that be an innocent mistake — $21,000.00 against $94,000.00? Is that error or omission?

Can you just turn a thing like this over to an accountant and let him forget to report the difference between $21,000.00 and $94,000.00? Can you just sign a return, turn your back, and say that it is not wilful? I think that gets pretty hard to swallow.

In the year 1944 he reported $11,000.00; he should have reported $89,000.00. In the year '45, he reported $20,000.00; he should have reported $43,000.00. Those are large discrepancies. In the year '46, he reported $27,000.00. This is the year that the investigation began incidentally. He reported $27,000.00 and should have reported $36,000.00. In the year '47, he reported $20,000.00 and should have reported $41,000.00.

Can it be said that that was an unintentional omission?

Now, while we are on this big chart, again I want to call your attention to the first year upon which the prosecution is actually based, and that is the year 1944. You have heard the agents testify again and again that they made diligent search to find out what this man's assets and liabilities were. They had frequent contact with his attorneys and with his accountants, and those attorneys and accountants didn't see fit to make any explanation for that increase. The man was just too rich at the end of some of these years and couldn't account for it by the amount of income which he had reported.

The agents wanted to be sure that in 1944 when the man had a net worth of $231,000.00, and when in '45 he had a net worth of $270,000.00, -- they wanted to be sure that that didn't represent some savings that he might have had in one of these prior years (indicating), that it didn't represent a loan by a friend who loaned him money to invest in these assets which they found. They wanted to be sure that there was no inheritance. If the man had inherited money and put it in there, why, of course, it wouldn't be income. If someone had given him thirty or forty thousand

dollars and he invested it in a building and the agents came and added up his net worth and found he was worth $40,000.00 more, it would be simple for him to say to the agents, "There is my friend John Jones, — he just gave me $40,000.00 last year." — and that would have ended it. No such explanation has been made. No explanation has been made up until this moment. The men — the associates in business, the people who have shared in these ventures, — they have not been called to explain this.

Now, the agents made a search to ascertain whether or not the money was from gifts, from inheritance, or bequest, whether or not it represented prior accumulated savings, and at that point they said, "Well, now, it is just possible this man might have had some prior accumulated savings. Let's look for a point where he didn't have any prior accumulated savings and we know by his own statement just what he is worth." So then they went from '44 back to '36, and that is the only significance that 1936 has in this case.

Now, let's assume that in 1936 he did have some cash. Let's just say that he had five or ten or fifteen or twenty thousand dollars in 1936 hidden away in a safety deposit box. Here is $22,000.00 of increase in net worth in the next four or five years. He hasn't explained where that came from. Couldn't that be the money which, if he had it, he would have saved?

What of this $34,000.00 (indicating)? That will soak up a lot of money that a man might have salted away, or the $73,000.00 in this year (indicating), or the $78,000.00 in 1944 (indicating).

No, to be led to believe that an accumulation of savings over in here in '36 is represented by what we charge as being income here (indicating), you must take this route: You must say he saved all this money, — all these increases in net worth for which he paid no tax. They don't count; they go out the window some way. But then in 1945 he

reached way down in the sock and he pulled out $23,000.00 and in this year he pulled out $9,000.00, and in this year he pulled out $20,000.00, — and there is no explanation for these large figures which you see here on the bottom line of this chart in the years previous to prosecution.

All it would take is an explanation. That explanation hasn't been given. Now, I think it has been explained, and I beg your pardon if I repeat, — this case has been complex to me in some respects, but it boils down to just a couple of simple little propositions. Rita Banks got too rich for what she had reported in income too. She had too much money in her hands to be accounted for by what she had reported.

Tom Banks answered in the questions and answers which were submitted to him, through Mr. O'Gordon, in his return — let me read you the whole question; you have heard it before: "The investigation has disclosed certain assets and liabilities in the name of Rita Lee Banks, others in the name of Thomas W. Banks, and still others in joint tenancy. Does the acquisition of joint tenancy assets above represent income by Thomas Banks or by both he and Rita Banks?" — Thomas Banks was the answer. That is the answer he gave. In other words, he says, "All right, she has got too much money on hand. We have some property in joint tenancy, but I put my money in there." — so if he spent the money, it was his money he spent. We say it was his money; it was income. That is the only conclusion you can reach.

Now, the next question: "Does Thomas Banks consider Rita Banks individually liable for cumulative net worth as determined from assets in her name in excess of the funds available from her reported income, or does he hold himself liable for her excess in cumulative net worth?"

In other words, what the agent says here, — Rita is much richer than she should be according to what income she

has reported. Now, who is responsible for this money in the middle here over her income? The answer: "Rita Banks' assets acquired from Thomas Banks."

That is why, gentlemen, as you look through the exhibits you will see many exhibits with the name Rita Banks on them, — many exhibits with the name Tom Banks on them. You will see records of partnership returns where Rita Banks is in partnership with some of these fellows.

Now, has the Government had any help here? Has the jury had any help from the various people who have been associated with this defendant? Have they come to explain to you the various ventures in which they were interested? Mr. Archie Cary was associated, I believe the records will show, in some partnership venture. Mr. Bortz, Banks and Cary were in the National Plastics venture. Harry Clark hasn't been in court. He is interested in Brady's Bar, the 10th Street Realty, and Koolaire, Inc. Has he been here to explain what his interests are or to refute the figures which the Government has given here? No.

Harry Shepard was interested in this $25,000.00 loan to McCarthy's and in other assets here. National Plastics, — he was interested in the partnership of Banks and Shepard,— I believe that one he was interested in it with Rita Banks. But has Harry come here to explain that the Government is wrong in the figures we have established here?

Coin-A-Matic Amusement Company, — is Harry Clark here to tell us we were wrong in charging the defendant with what we did with reference to his investment in the Coin-A-Matic Amusement Company?

The B. & S. Company, — has Harry Shepard come here to tell us anything about that, or has Tom Ewing? Mr. Ewing hasn't seen fit to come and explain what happened to that $10,000.00 loan which I just made reference to.

You would think that Mr. Weinstock would have some explanation for these matters. I don't see Mr. Weinstock here explaining them. They are not offering much help in that regard.

Now, I think that the figures have abundantly shown that there is a tremendous increase in net worth here in this case, — an increase from $18,000.00 to $322,000.00, and that in addition to that there has been some money spent for other things. Now, can it be said that a man can have an increase in that amount, and as you see by comparing the two lines just above the bottom line, it appears that he has reported amounts varying from one-half to approximately one-fourth or fifth of what he has earned. Can a man close his eyes and say, "I didn't know what the picture was."? — or, "The Government hasn't proven that I knew this."

Now, gentlemen, look at those bottom two lines, — the bottom three lines. It leads to only one conclusion. You just can't get that rich and have that much income and sign a return for so much less and not be doing it wilfully and knowingly.

What other evidence do we have of wilfulness or knowingness? You have heard the agents testify as to the way transactions were carried on. There were no bank accounts to speak of. The usual banking methods were neglected. Checks were taken from one party and handed to a third party, — never went through a bank. Sell one asset, obtain another. When the Federal Government Bonds were cashed in the First National Bank, this defendant took the checks, cashier's checks, — cashed in the bonds, took the cashier's checks, and went over and bought Northwest Airlines stock and other stocks in a stock brokerage outfit. The agents have made a diligent search and have uncovered those transactions and have submitted their results to you here in the form of a chart which shows the activity.

I am just going to walk over to that chart once more and show you one more thing which I have already talked of and which I just want you to keep in mind, because you are going to hear a lot of talk about a lot of things that don't mean anything in this net worth case. The years we are concerned with, or the question we are concerned with is how much was he worth right there (indicating), and how much richer was he right there (indicating the years '44 and '45). That is what we are concerned with. It doesn't make any difference if an agent made a computation or a calculation over here (indicating 1936). The things that disappear, disappear. They don't enter into our computations. You see, that is because when a man sells something during the year, he doesn't have it on hand at the end of the year. If he sold a big house at the beginning of the year he wouldn't have it on hand, but through our computation and through search it would either turn up in a bank account, in another investment, in cash on hand or in some other place, but you don't count a building that is sold in the middle of the year. That is what happens here in the years '36, '41 and '42. Some of those items disappeared, but it is submitted that the reason for going way back here to '36, way back in here (indicating), is not to find dollar for dollar what he has. It is to find a pattern and to show that at this time (indicating 1936) he was relatively a poor man, and that the increases in net worth for these subsequent years where he didn't report $34,000.00, $73,000.00 and $78,000.00 — they would soak up, or as the agent said on the stand, absorb any little extra cash or any little extra loans that might have been outstanding as of this time. So that when you get up into '44 and an agent had started working in '36 and made diligent search in '43 and '44, — you have an almost ironclad picture of that man's financial activities. So when you hear conversation about years preceding this, I submit that you remember what I am now suggesting that the important years are the last four years.

Look at those lines (indicating), gentlemen. It is up to you to decide. I don't think that you will have any difficulty in arriving at the decision that Mr. Banks failed to report a substantial portion of his income. I believe that is what the Court will advise you is required. The Government is not required to prove every dollar which they allege. I think you will not find a substantial discrepancy between what we have alleged we could prove and what we were actually able to prove. I think you have observed the conduct and the demeanor of the witnesses. Counsel will perhaps make great moment of the fact that we haven't proven every dollar, or were many dollars short of what we have alleged in our indictment, but the question that we submit to you here is not — Has the Government been able to prove every dollar it alleged? The question you are asked to decide is — Did the man fail to report a substantial portion of his income, and did he do it wilfully and intentionally?

The tremendous increase,—a study of the pattern,—can lead you to but one conclusion, gentlemen. Thank you.

ARGUMENT

By Mr. Landrum

Mr. Landrum: May it please the Court, and gentlemen of this jury: May I not say to you in the beginning now what I said to you a week ago last Monday, that when this case is all through and done, your greatest recompense will be a consciousness of a duty performed, and for myself and those whom I have had the honor and the privilege to be associated with, I desire to express to you our most sincere thanks and gratitude for the attention which you have given to a case which may be somewhat disinteresting; and to counsel I express my personal appreciation of your many courtesies in the trial of this case.

I want to say to you, members of this jury, it shall be my earnest endeavor to say no unkind word of any man who has appeared in this case or who has had any part in the conduct of it, and I want to say to you that I am very proud and very happy to have had the honor and the distinction of being connected with the Government of the United States through many, many years. I thank George McKusick and "Jerry" Kleven. I have considered myself honored to work with them, and I now to you and to them express my thanks.

As we go along, you and I, and we sit down and undertake to discuss the facts in this case, I shall be very careful, very careful, very careful, not to misquote anything. If I do, you forgive me for it because I do not intend to do it. Now, before we go any further, I want to say to you that I feel very sure that never, never, never again will you sit as jurors in a case which has terminated as this one has terminated and yet had the defendant appear before you and ask you to bring in a verdict of not guilty. Men, there has not been a single scintilla of evidence introduced from that witness stand to contradict the evidence of the Government of the United States. I repeat, there has not been a single witness for the defense placed upon that witness stand to contradict the evidence which you heard adduced by the Government of the United States. And you took an oath, and what was that oath? — to decide this case upon the evidence that you heard from that witness stand and upon the law as it would be given to you by this Court. That is the oath which you took, and I say to you the evidence of the Government stands absolutely uncontroverted and uncontradicted in this case.

Now, I shall address myself for just a moment to an effort to in my small way—and I want to say to you that I have no pleasure, have no pleasure in prosecuting any man, nor is it any pleasure to us to come into this court room and undertake to carry out the oath that we took as officers

of the Government of the United States. Sometimes as we go into cases of this kind, we become disheartened, discouraged, low, feeling blue, because they pile it on,—they pile it on. I wonder if it is an honor to represent the Government of the United States or if it is a mark, a stigma, or something? We try, we do the best we can, and yet it seems as though we are criticised for it. But you know, as I go along, it seems as though a still small voice says to me, "Go on, go on."—that is the voice of the people, and we go on.

Mr. Hoffmann stood before you and he made a very wonderful talk, but did he discuss with you the evidence in this case? Did he? No, he talked about the Statue of Liberty, he talked about Memorial Day and things like that, and he castigated George McKusick. Men, they must try someone else in this case because they are defending the defendant. But he talked about presumption of innocence, and he can't beg of you, beg of you, beg of you any more sincerely than I can to give this defendant the presumption of innocence.

He talked about a trial by jury and he talked about reasonable doubt. Yes, yes. In connection with those matters, all I have to say to you is this: Please, please, please listen to what his Honor tells you is the law with relation to them. His Honor will tell you what is meant by the presumption of innocence. His Honor will tell you what is meant by the term "reasonable doubt", so I am going to repeat that two or three times in connection with the little talk that you and I are going to have. We are going to sit down together and talk about the evidence, but remember now, you are the sole judges of the facts, but his Honor will tell you what the law is, and with that statement I think that I shall pass on from those three arguments.

There is one thing that Mr. Hoffmann said that hurt me a little. He said that there was evidence in this case that a man by the name of "Mitch"—"dead men tell no tales"—that a man by the name of "Mitch" had paid some $19,000.00.

There is Exhibit 117 and 117-A to -Z—you remember those, members of the jury (indicating)—you can add it up yourself. There is no evidence that that was money which this defendant had outside of everything, but if there is, it isn't $19,000.00. It is $9,805.42. The total of those checks, which were made out in the year 1947, is $9,805.42. All the balance of them are after 1947, and we are not concerned with any year after 1947. So Mr. Hoffmann hurt me a little when he said to you $19,000.00, because only $9,805.42 is contained in those checks as having been paid in the year 1947.

Mr. Graff—well, I was a little amused, because Mr. Graff seemed to think from the beginning of this case that we should have brought you an exhibit with relation to the amount of money in cash that Mr. Banks had in his pocket. Now, for the life of me, I have been unable to determine what kind of an exhibit we could have brought to you to show the amount of cash Mr. Banks might have had in his pocket. We couldn't take a picture of it; we couldn't bring an exhibit in here, if he had any cash in his pocket. I don't know what he meant, but I do know this, that Mr. Banks made a sworn statement to representatives of the United States on July 2, 1937, in which he did not list any cash.

I do know this, that Mr. Banks and Mr. Weinstock and Mr. O'Gordon sat down with a list of questions, which had been submitted to them by Mr. McKusick in November, 1951—or 1950—and took three months to answer it. When they asked him how much cash he had, I know that—that is Exhibits 70 and 71—they asked him how much cash he had, and strangely, strangely, strangely, he did not tell them. Now, why? Well, I will leave it to you.

Then the statement was made here that the United States Government, through me, had come into this court first and said that Mr. Banks should have paid $42,000.00 in income taxes, which he didn't pay, and that then we reduced it to $32,000.00. Oh, men, so far as I am personally concerned,

I wish we could have reduced it to nothing. Yes, it was reduced; it was reduced in an effort to bring in here nothing except the absolute and unadulterated truth. Yes, it was reduced, and it would have been reduced right up to now if that was right and just and fair. So far as we are concerned, this defendant shall and will have a fair and a just trial. His Honor will see to that, and we will help him to do it. And then, you see, men, sometimes some of us who have had years of experience in this kind of thing are able to anticipate and are able to understand what the lawyers say, probably a good deal better than a man who hasn't. Now, Mr. Graff made a most strange argument. I will tell you what he argued for. He argued for a hung jury. And I will tell you why I say that,—because he repeatedly said, "You exercise your own individual judgment." That is what he argued for. His Honor will tell you what you should do when you get in the jury room.

Now, let's go along; let's talk about the evidence in this case. And I desire to say to you that I am going to try to follow some notes as well as I can, because I don't want to say anything wrong. All that the Government has to prove in this case is that the defendant attempted to evade a substantial portion of his income taxes for the three years charged in this indictment. All that the Government has to do is to prove that he attempted to evade a substantial portion of his income taxes for three years. Now, I think His Honor will tell you that that is the law. Let me just go with you a moment to what I characterize as the "tall pines in the forest of evidence" in this case.

One, there is no evidence in this case that you heard from that witness stand to contradict the evidence introduced by the Government. Therefore, that is the only evidence which you can consider. Now, what I say to you is not evidence; what these other lawyers have said to you is not evidence. Evidence is what you heard under oath from that stand.

POOR COPY

Now, they haven't put a single witness on there to contradict a single word of it. So it stands uncontradicted.

Now, men, with that set of circumstances,—how, how, how on earth, under your oath, can you do other than bring in a verdict of guilty on each count?

Cash, cash, cash—cash has floated around in this case until I have almost "cashed in." $22,805.00 in cash money was paid by Mr. Banks to Mr. Clark for stock in Koolaire, and that is shown by the deposit slip of Koolaire—$22,805.00 in cash. Mr. Banks loaned the man who came in here with a broken leg $10,000.00 in cash. Wickers paid Mrs. Banks—now, I don't know whether the loan had come from Mr. Banks or whether Mrs. Banks had made it—but Wickers testified that he paid to Mrs. Banks four thousand, six hundred and some odd dollars in cash.

I am going now to the tall pines, the things that stick out like a sore thumb and that you can't miss. There is another one; there is the analysis of the testimony in this case. What does it show? Thomas W. Banks reported $20,170.00 as his net income in 1945, when according to the uncontradicted evidence in this case, he should have reported $43,690.11. Men, if you made $43,000.00, you would know it, and if your income tax return only showed $20,000.00, you would know that that income tax return was wrong.

There it is, (indicating)—in 1947 he reported $20,609.29, when according to the Government's figures he should have reported $41,453.07. Men, if you made $41,453.07, and Mr. Weinstock—I choke when I think of him—made out a return for only $20,000.00, you would know he was wrong. You are 21 years old, and you can read and write and sign your name, and his Honor is going to tell you when you do that, you are presumed to know what you are signing. He will tell you that that is the law, so that is another thing.

Now, let's go on to some more things here that interest me. Thomas Banks and Mrs. Banks are man and wife. I don't know—I am sure she is a fine woman. My mother is. Thomas Banks and Rita Banks are one and the same insofar as this case is concerned, because Thomas Banks swore that Rita Banks' assets were acquired from Thomas Banks, and that is in Exhibit 33.

Mr. Hoffmann: If the Court please, the defendant desires to show that counsel's then statement is an improperly prejudicial one.

The Court: The record will show what the statement was.

Mr. Landrum: (To the Clerk) Will you give me Exhibit 33?

(Exhibit handed to Mr. Landrum.)

Mr. Landrum: Yes, I am wrong; I apologize. It is in that other exhibit. I got the exhibit number wrong.

Mr. Hoffmann: And the other exhibit, may the Court please, is not a sworn statement as counsel suggested to the jury.

Mr. Landrum: That is correct, Your Honor.

The Court: Very well, keep within the record.

Mr. Landrum: Yes, sir.

What actually happened, and I apologize for it—in the question and answer statement, which was not a sworn statement, Thomas Banks in response to the question said this: "Rita Banks' assets acquired from Thomas Banks."

That wasn't a sworn statement. That was the answer that Mr. Banks and Mr. Weinstock and Mr. O'Gordon got together and gave to Mr. McKusick. Now, Rita Banks' income, and it is on one of these charts, was very, very, very small each year. The highest income that she reported was about $1,300.00 for the highest year. Some of them were down

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$100.00, or $200.00 or $300.00. You will see it there (Indicating). Thomas Banks in his own returns took credit for the taxes which were paid on the home, which I believe was in joint tenancy. Thomas Banks included in his own returns rents on the Beard Avenue place, which was in Mrs. Banks' name. Thomas Banks took the capital loss on stocks which were in Mrs. Banks' name. Thomas Banks took all the losses or gains on the Anoka farm, which was in joint tenancy.

F. J. Wickers handed Mrs. Banks $4,680.00 in payment of a loan which I understood him to say he had gotten from Thomas Banks. I don't think there is the least question but what they were commingled,—I am sure that you are clear on that.

Now, where did Thomas Banks' income come from? You take those income tax returns and you will see that a very large, very large, very large percentage of it came from what is designated there as "gaming". Now, that means cash money coming in and going out.

I think that this question of intent may be considerably important. Now, you listen to the Court's charge with relation to intent. I think he will say to you that intent is a state of mind. You can't look into a man's mind to see what he went on. A man is presumed to intend the reasonable consequences of his acts. Now, this defendant kept no personal books of account; he handled his affairs so as to avoid the usual records; he had very, very few bank accounts. None of this is contradicated, and before I get through, I want to give you what I consider the classic of this case, and that is Mr. McKusick's description of how he handled his money.

Then they say that there is no proof of wilfulness. Again I say, you listen to the Court's charge in that regard, please. If you made $40,000.00 and the income tax return that you sent in only showed $20,000.00, wouldn't you know it? A man who is able to write and sign his name does it wilfully.

BLEED THROUGH

Now, he must have known that these income tax returns were incorrect. Why?—because in 1947, according to the testimony, according to the testimony, and according to all of the testimony in this case, in round figures his income was $43,000.00 and he only reported $20,000.00; in 1946, in round figures his income was $36,000.00, and he only reported $27,000.00; in 1947 his income was $41,000.00, and he only reported $20,000.00. I have taken that information off there and I have been as fair as I could to try to give it to you in round figures.

Now, those figures are not denied. From evidence on that witness stand, which you said that you only would take into consideration, they are not denied. There hasn't been a single witness to contradict them. The fact that this witness signed these returns is sufficient for you to find that he had knowledge of their contents. I think his Honor will tell you that is the law.

The Government of the United States does not have to prove the exact figures in this indictment. I think his Honor will tell you that is the law. As a matter of fact, if you listen to his Honor's charge, I think he will tell you that it is not necessary that the Government prove an evasion of all the tax charged. It is sufficient if any portion of the tax was attempted to be defeated and evaded as charged in that count. I think that is the law.

Now, the figures, therefore, which the Government presents here do not have to be correct to the dollar. That is true of both the starting point and of the tax. I think his Honor will tell you that. But Mr. Lord has pointed out to you the situation here which really, really, really exists, and that is that the year with which we are really concerned is 1944. That is, what did he have the year before he was charged with this offense? So 1944 is the real honest-to-goodness starting point. Then we took what he had at the end of 1944, then we took what he had at the end of 1945,

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and we deducted what he had at the end of 1944 from what he had at the end of 1945 and the difference must have been what he had made during that year. Then we took what he said he made and it just didn't figure out. He just had too much money.

So it is perfectly plain to me, and I hope it is to you. You take what he had at the end of '44; you take what he had at the end of '45. You deduct the '44 from the '45. The difference you get is what he must have made during that year, and when he only reported half of it, then we say that the offense here charged was complete.

Now, as to Mr. Weinstock—you know, as I lay in bed the other night, I thought of Weinstock, and I thought. "Oh, what a tangled web we weave when we practice to deceive." And Weinstock—Weinstock came on this witness stand, told you that he had appeared before the Grand Jury on the 2nd day of May, and when I was talking to him and with him, I felt that he was not being entirely fair. So you will recall that I took the record of his testimony and walked up there to him. Now, men, you saw him here. Mr. Weinstock came into this court room and did everything that he possibly could for the defense in this case and he went just as far as he possibly could and yet at the same time not admit that he was also mixed up in this thing. If he had told you that he knew that these returns weren't correct he would have been an accessory, and I want to say to you that then when he injected into this case some things,—when he injected a man who has passed away and gone to the Great beyond, a man whom he knew we could not possibly bring in here I thought again. "Dead men tell no tales."

It is Weinstock who talked to Mr. Graff. It is Weinstock who talked to Mr. Graff after he went before that Grand Jury and before he came on that witness stand—

Mr. Hoffmann: If the Court please, objection is taken to counsel's statement as an improperly prejudicial one and not based on evidence.

The Court: Gentlemen of the jury, you will remember the evidence in this case. I am not sure as to what the testimony was in regard to the statement that was made. You may proceed, counsel.

Mr. Landrum: (Continuing) Members of the jury, again I say forgive me, but my mind is very, very clear on that. You will remember what he said. Then let's go along to the man who has borne the burden, to the man who carried this on his shoulders for about six years, George McKusick. Why, why, has it come about that when a man does his duty as he has seen it as best he could, and why is it that when he comes before a jury of his peers and undertakes to explain what he did, that then they have to try him instead of the defendant?

It is an honorable thing to be employed by the Government of the United States, and I want to say to you that sometimes, sometimes some of us get a little hurt by things which are said of us. George McKusick told you that he went with the Internal Revenue Bureau in 1941. He told you that he started the investigation of this case in 1946. He told you that he and a group of agents turned over every check, every cashier's check, went into every bank in Minneapolis except one, and turned over every cashier's check and draft in there in an effort to find out what Mr. Banks' financial transactions were.

He told you that Mr. Banks had not kept any books and records. He told you that he called for cancelled checks, and here is what he said—"They gave me some bank statements and some cancelled checks. In most cases some of the checks were missing out of several of the statements." Why? Was it because those checks might have disclosed something?

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And Mr. McKusick said this, "The defendant had more money or assets at his disposal in each calendar year than he had reported for income tax purposes."

That statement by Mr. McKusick has not been contradicated by any evidence from that witness stand. And here is the classic: He said the defendant would buy a cashier's check with currency, use the cashier's check to buy property, sell the property, use the proceeds of the property to buy War Bonds, and cash the War Bonds to buy listed stocks, without a single entry being made in any bank account. And that is not denied.

And Mr. Kleven, another gentleman, another gentleman—yes, another Government employee—came on this witness stand. Do you know any reason why he would seek to do any wrong? Is there any reason on earth why any of us are in here? Men, we have carried this burden on our shoulders and it isn't going to be very long until we are going to transfer it to yours. Mr. Kleven came here and told you what he had done. He told you honestly and sincerely of the investigations that he had made himself. He told you of the charts that he had drawn. Yes, he did start drawing charts a long time ago. Yes, that is the way they build up, that is the way they set up a net worth case, by net worth charts. But as the evidence was adduced here, as the testimony came in, as we made further and more complete investigation, changes were made, and as I said to you a moment ago, if we knew there was another change that could be made or should be made, I would make it right now—and my compliments to you gentlemen who have the honor and the distinction of representing your Government and mine.

Gentlemen, is it necessary that you and I sit down and talk much longer about this matter? Please listen to what his Honor tells you is the law. Let me say this to you again: Never, never, never will you or I ever see a case like this one,

where the only evidence which is presented from that witness chair is the evidence of the Government of the United States and not a single witness takes that chair to deny it, or to contradict it, and yet they come in here and ask you to bring in a verdict of not guilty. You took an oath, even as I did. You said that you would decide this case upon the evidence that was heard from that witness stand and upon the law as it would be given to you by this Court,—and you will, and you will, and you will, and that verdict must be guilty on all three counts.

Now, please remember it is not necessary that the Government prove figures exactly. All that it is necessary to do is that you be convinced beyond a reasonable doubt. Now, reasonable doubt doesn't mean any imaginary doubt, his Honor will tell you. That is all.

We have done the best we could. It hasn't been any pleasure to be here; it hasn't been any pleasure to you. We have been struggling here for several days, and we have had to stay here over Memorial Day. That is too bad, but justice must be administered.

I am almost through. I wish I could read your minds. If there is anything that you are struggling with, I would try to help you but I can't see where it is. I can't see how there could be any possibility in view of the fact that there is no evidence on the other side of this case.

Shall I tell you a story? I think they went a little too far when they expect a jury to bring in a verdict of not guilty in this case.

There was a colored boy down in Oklahoma who was in the Army, and he got out of the Army and came back down to Oklahoma and he met a gentleman who had been his friend before he went in the Army. He said, "Why, hello, Rastus", he said, "how did you like the Army?"

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"I didn't like it, boss,—I didn't like that Army at all. I got court martialed."

His friend said, "You got court martialed? What did you get court martialed about?"

"I don't know, I don't know,—it was something about a 'furlong'."

"Well," he said, "it couldn't have been about a 'furlong'. It must have been about a 'furlough'." Furlough is a military term.

"No, sir, no sir,—it was about a 'furlong'. They said I went to 'fur' and I stayed too 'long'."

Thank you when you get all through and done, your mind and memory will ever remain green with the thought that you have done what is right, and nothing is going to haunt you,—nothing is going to haunt you. So now again I say, do your duty as you see it. Should you see fit to bring in a verdict of not guilty here, 'Gus' Landrum is not going to criticise you. The American jury system is a wonderful thing. May you do what you feel is right. May you give this defendant a fair and impartial exercise of your best judgment and bring it in without fear or favor. Let the chips fall where they may. We thank you very, very, very much.

COURT'S CHARGE TO JURY

The Court: Gentlemen of the jury:

The Government of the United States has undertaken to provide laws, legal procedure, and courts so as to protect at all times the rights and liberties of the people. A fair and impartial trial of both civil and criminal cases is essential to insure the proper administration of justice. In addition to laws providing for rights and remedies it is necessary to have and observe rules of evidence and procedure and throw

about the trial of cases every possible safeguard so as to eliminate all improper and extrinsic influences that might affect the verdict of the jury and so as to insure as far as possible an unbiased unprejudiced result. As I stated in the beginning this case should be decided on the evidence presented to the jury from the witness stand in this trial.

You have heard the evidence in this case, the arguments of counsel and their respective views and contentions. It now becomes your duty to consider all the evidence in the light of the rules of law given to you by the Court in this charge and it likewise is your duty to apply these rules of law to the facts as you find them from the evidence. It is your exclusive duty to determine the facts and not to accept any comment of the Court or counsel made during the trial insofar as the facts are concerned. It is proper for the Court to instruct on the legal principals involved and for counsel to express their views, but you, yourselves, must decide the facts except where they have been admitted during the trial. You should depend on your own memory for the evidence, draw your own conclusions and form your own opinions. In deciding this case you are performing one of the most important duties of citizenship and you should act courageously. Your verdict should not be influenced by sympathy or prejudice.

On January 14, 1952, a Grand Jury of the United States acting within and for the State of Minnesota returned an indictment against the defendant Thomas W. Banks containing three counts.

In the first count it charged that the defendant wilfully and knowingly attempted to defeat and evade a part of the income tax due and owing by him to the United States for the calendar year 1945.

In the second count it charged that the defendant wilfully and knowingly attempted to defeat and evade a part

of the income tax due and owing by him to the United States for the calendar year 1946.

In the third count it charged that the defendant wilfully and knowingly attempted to defeat and evade a part of the income tax due and owing by him to the United States for the calendar year 1947.

The defendant entered a plea of not guilty to the indictment, which is a denial of the facts alleged by the United States in the indictment and the indictment with the plea of not guilty defines the issues for your consideration and determination in this case.

The filing of the indictment is not evidence of the guilt of the defendant. It does not raise a presumption of guilt or a presumption against him. The indictment is the formal, written accusation or pleading provided by law for bringing the defendant to trial. It should be regarded in that light and in no other.

The defendant is presumed to be innocent until his guilt is proved by competent evidence which is produced against him, and this presumption of innocence remains with him throughout the trial and applies to a consideration of each of the essential elements going to make up the crimes as charged.

The burden devolves upon the Government that presents this charge of meeting the presumption of innocence and overcoming it by proof, and the degree of proof which the law establishes as the standard by which the defendant shall be tried is that his guilt must be shown beyond a reasonable doubt. The defendant cannot, therefore, be convicted of the offenses charged in this indictment unless and until each and every essential element of the crime has been established by evidence that satisfies you beyond a reasonable doubt.

When all the evidence in the case, carefully analyzed, compared and weighed by you, produces in your minds a settled conviction or belief of the defendant's guilt, such a conviction as you would be willing to act upon in matters of highest importance relating to your own affairs, when it leaves your minds in the condition that you feel an abiding conviction amounting to a moral certainty of the truth of the charge, then, in that event, you would be free from a reasonable doubt.

A reasonable doubt is not a mere whimsical or captious doubt, for anything relating to human affairs and depending upon human testimony, is open to some possible or imaginary doubt. Absolute or mathematical certainty is not required, but there must be such certainty as satisfies your reason and judgment and such that you feel conscientiously bound to act upon.

The rule which clothes every person accused of crime with a presumption of innocence and imposes upon the Government the burden of establishing his guilt beyond a reasonable doubt is not intended to aid anyone who is, in fact, guilty of a crime to escape, but it is a humane provision of the law, intended so far as human agencies can, to guard against the danger of any innocent person being unjustly punished.

This is a criminal case and is based on a statute of the United States, Title 26 U. S. C., Section 145 (b) which provides:

"Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect and truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, which, in addition to other penalties provided by law, shall be guilty" * * * of a violation of the law.

The United States has offered evidence to show that the defendant for the year 1945 filed an income tax return in which he reported a net income of $20,170.11 and a tax due the Government in the sum of $7,675.27, whereas the defendant's net income for the year 1945 was in fact $43,690.11, on which he should have reported and paid a tax in the sum of $22,719.33. In other words, the federal income taxes the Government contends should have been paid but were not reported for the year 1945 were $15,044.06.

The United States has further offered evidence to show that the defendant for the year 1946 filed an income tax return in which he reported a net income of $27,100.99 and a tax due the Government for that year in the sum of $10,556.98, whereas the defendant's net income for 1946 was in fact $36,799.97, on which he should have reported and paid a tax in the sum of $16,386.39. In other words, the federal income taxes the Government should have been paid but were not paid for the year 1946 were $5,829.41

The United States has further offered evidence to show that the defendant for the year 1947 filed an income tax return in which he reported a net income of $20,609.29 and a tax due the Government for that year in the sum of $6,955.14, whereas the defendant's net income for the year 1947 was in fact $41,453.07 on which he should have reported and paid a tax of $19,022.69. In other words, the federal income taxes the Government contends should have been paid but were not reported for the year 1947 were $12,067.55.

The United States by this evidence has sought to prove that the defendant has wilfully attempted to defeat and evade the payment of a total tax of $32,941.02 for the three years.

If you find from the evidence in this case that the defendant wilfully and knowingly attempted to defeat and evade

a large part of his income tax due and owing by him to the United States for the calendar year 1945 as charged in the first count of the indictment, then you should find him guilty on the first count. Unless you do so find, you should return a verdict of not guilty on the first count of the indictment.

If you find from the evidence in this case that the defendant wilfully and knowingly attempted to defeat and evade a large part of his income tax due and owing by him to the United States for the calendar year 1946 as charged in the second count of the indictment, then you should find him guilty on the second count. Unless you do so find, you should return a verdict of not guilty on the second count of the indictment.

If you find from the evidence in this case that the defendant wilfully and knowingly attempted to defeat and evade a portion of his income tax due and owing by him to the United States for the calendar year 1947 as charged in the third count of the indictment, then you should find him guilty on the third count. Unless you do so find, you should return a verdict of not guilty on the third count of the indictment.

The offense with which the defendant is charged in each count of the indictment involves two principal elements.

One, there must have been a tax due under the applicable Revenue Act from the defendant.

Two, there must have been a wilful attempt by the defendant to evade or defeat such tax or the payment thereof.

The question here is whether you are convinced from all the evidence in the case of the guilt of this defendant of the offenses with which he is charged in each of the counts of the indictment. This question involves two determinations.

One, whether you are convinced from all the evidence that there was due from the defendant for each of the years 1945, 1946, and 1947 an income tax in amount greater than that reported and paid by him to the Government for that year and if you are so convinced that such is the case, then.

Two, whether you are further convinced from all the evidence that there was a wilful attempt by the defendant in each of said years to evade or defeat any part of such income tax by means of filing a false or fraudulent return for each of said years.

The gist of the offense charged in the indictment is the wilful attempt on the part of the taxpayer to evade or defeat the tax imposed by the income tax law. The word "attempt", as used in the law involves two elements: An intent to evade or defeat the tax and some act done in furtherance of such intent. The word attempt contemplates that the defendant had knowledge and understanding that during the calendar years 1945, 1946, and 1947 he had an income in such years which was taxable, and which he was required by law to report and that he attempted to evade or defeat the tax thereon, or a portion thereof, by purposely failing to report all the income which he knew he had during such calendar years and which he knew it was his duty to state in his returns for such years. The attempt to evade and defeat the tax must be a wilful and knowing attempt, that is to say, it must be made with the intent to keep from the Government the tax imposed by the income tax laws which it was the duty of the defendant to pay to the Government. The attempt must be wilful, that is, intentionally done with the intent that the Government should be defrauded of the income tax due from the defendant.

The presumption is that a person intends the natural consequence of his acts and the natural presumption would

be if a person consciously, knowingly, or intentionally did not set up his income and thereby the Government was cheated or defrauded of the tax, that he intended to evade and defeat the tax.

You should know something of the provisions of the Revenue Act applicable to the years 1945, 1946, and 1947 imposing the tax. The income tax is not levied on all of the money or its equivalent received by an individual during the year. In the first place, only income is taxable. Income is the gain derived from capital, from labor or from both combined, and from the profit on the sale or conversion of capital assets and only when the conversion or the sale of the capital assets results in profits. Furthermore, the tax is not computed on the total amount of such gain derived during the year but only a part thereof determined in the manner prescribed by the revenue laws.

It is the policy of the law to tax income and not capital, and only that portion is taxed which is net income. The Revenue Act under which the indictment here is brought imposes a normal tax, so-called, on the net income of the taxpayer according to a graduated scale. The same Act imposes a surtax on net income according to a graduated scale.

Net income means the gross income computed under the Act less the deductions allowed by the Act.

Consequently, you will observe that the first step in arriving at the income of an individual on which the tax is computed is the determination of the gross income of the individual. Gross income includes gains, profits and income derived from salaries, wages, or compensations for personal services, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in profit whether real or personal, growing out of the ownership or use of or interest in such

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profits; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit or gains or profits and income derived from any source whatever.

Chapter I of the Internal Revenue Code imposes an income tax on individuals, including a normal tax as specified in Section 11 and a surtax as specified in Section 12. Hypothetical questions were put to a revenue agent on which he computed the tax which the Government claims should have been paid for each of the three years involved.

You are instructed to determine whether the individual tax liabilities for the years here involved are correct as the same is set forth in the computations and charts made by the Government's expert witnesses in response to the hypothetical questions which assume the truth of the Government's evidence.

It is not necessary that the Government prove an evasion of all of the tax as charged in the indictment. It is sufficient if any substantial portion of a tax was attempted to be defeated and evaded as charged in that count.

The owner of a business need not be an accountant or bookkeeper to be familiar with the affairs of his business. If the inability of an owner to be familiar with the books and affairs of a business could be accepted as an excuse for filing a false tax return with the Government, he could escape punishment irrespective of guilt. Of course, he could not be held liable for innocent clerical mistakes, but he must be held to know that which it is his duty to know and which he solemnly promulgated and placed in a tax return and it is for you to determine from all the evidence whether the defendant in this case had knowledge of the falsity of the returns made by him.

The duty to file an income tax return is personal, and responsibility for it cannot be delegated. It is true that

many businessmen, or men who are not familiar with making returns have their attorneys or agents prepare their returns for them, but they must sign such returns and are responsible for them. Clerical mistakes, of course, can occur. Bona fide mistakes should not be treated as false or fraudulent but no man who is able to read and write and who signs and verifies a tax return should be permitted to escape the responsibility of at least good faith and ordinary diligence as to the correctness of things which are contained in the statement which he signs and verifies whether prepared by him or by someone for him.

A man may not shut his eyes to obvious facts and say he does not know. He may not close his eyes to the observations and his knowledge of things that are obvious to him and say, "I have no knowledge of those things." He must exercise such intelligence as he has, and, if the evidence shows that he has intended to conceal tax liabilities from the Government, then, of course, he was not acting in good faith. This question of intent is a question that you must determine for yourselves from a consideration of all the evidence.

The element of intent enters into the offenses charged in the indictment and is one of the questions for you to consider and decide. That is, whether the defendant wilfully and knowingly attempted to defeat and evade a portion of his income tax due and owing by him to the United States of America for the calendar years 1945, 1946 and 1947.

It is seldom possible to prove by direct evidence of the intent actually existing in the mind of a person at a given time. The state of a person's mind generally can be determined by his acts, conduct and manifestations and in determining the question of intent in this case you should take into consideration not only the direct evidence bearing thereon but all the facts and circumstances surrounding the defendant in connection with his business affairs and

enterprises during the years mentioned. If from a consideration of all the evidence you are satisfied beyond a reasonable doubt that the intent charged existed in the mind of the defendant, then you should so find.

Although the defendant is charged herein with attempting to evade his income taxes for the years 1945, 1946 and 1947 only, the Court, nevertheless, permitted evidence of like or similar transactions by the defendant for years preceding 1945. Such evidence is to be considered by you only insofar as you may find that it bears on or relates to the intent of the defendant with respect to tax evasion if evasion or attempted evasion you find it was. In other words, such evidence was admitted for the purpose of showing the state of mind or intent of the defendant.

The defendant is not charged in the indictment with failure to keep books or records. He is charged with wilfully attempting to evade or defeat income taxes due for each of the three years which I have mentioned. His failure, if any, to keep accurate books and records has a bearing only on the intent of the taxpayer in respect to the return that was made for any given year of the three. You have a right to consider the fact that accurate records were not made though the law at that time and before that time had required that such records be kept. You have a right to take into account that the law required the defendant to keep books and records when you are finding and determining with what intent the defendant acted, and whether his return was inadequate; otherwise the section imposing the duty on the taxpayer to keep the records is not here involved. However, if you find that he failed to keep proper books and records, it may be taken into consideration in determining whether he intended to evade and defeat the tax.

If you find that a fraudulent return was filed by the defendant with intent to defeat all or a part of the tax for any

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one of the years mentioned and that this was done wilfully, the crime is complete.

Circumstantial evidence consists of facts proved from which the jury many infer by process of reasoning certain ultimate facts. A conviction may be had upon circumstantial evidence, but to warrant a conviction on such evidence the proven facts must not only be consistent with the hypothesis of guilt and point surely in the direction of guilt, and must clearly exclude every other reasonable hypothesis except that of guilt.

To warrant a conviction upon circumstantial evidence, the facts proven must not only be consistent with the guilt of the accused, but they must also be inconsistent with any rational theory of his innocence. It is not sufficient that the facts coincide and render probable the guilt of the accused, but they must exclude every other reasonable hypothesis and must exclude the hypothesis of innocence.

You are the sole and exclusive judges of the credibility of the witnesses and it is for you to say who should be believed and to what extent. In determining these questions, you may among other tests, observe the demeanor of the witnesses upon the stand, their candor or lack of candor, their manner of testifying, whether direct or evasive, whether shifty or straightforward, their age and experience, and the reasonableness or the unreasonableness of their story when viewed in the light of the facts in the case which are admitted or proved by uncontroverted testimony, and when viewed also in the light of your own judgment and experience in the affairs of life.

You may also consider any testimony as to inconsistent statements or admissions made by any of the witnesses upon the stand or upon other occasions. You may also take into consideration the capacity and the ability of the several witnesses to observe, to know and to remember the facts and to relate them correctly. You may also consider any

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interest which a witness has or appears to have in the outcome of the case.

If you should find that any witness in the trial has knowingly and wilfully testified falsely to any material fact in the case, you are at liberty to totally disregard the testimony of such witness except insofar as it may be corroborated by other credible evidence in the case.

You need not concern yourselves with the question of punishment if you find the defendant guilty. The law places on the Court the responsibility of performing that duty.

I have referred to the evidence in this case in a very limited way. Indeed, I have undertaken to avoid comment on the evidence and on the facts as I may view them. Counsel for the respective parties have analyzed the evidence fully. The references I have made to the evidence do not mean that I have undertaken to emphasize any of the evidence in the case or that you should omit any of the evidence from your consideration. You should undertake by consultation among yourselves to refresh each other's memory and to recall the testimony on the several elements involved in these alleged offenses. You should give to such evidence all the weight and credit to which it is entitled in your judgment.

If you believe the testimony of the Government as it has been given in the trial, undoubtedly the defendant had income not shown in his income tax returns and on which he should have paid a tax but did not. If you so find — and this is a question for you to determine — you should return a verdict of guilty. On the other hand, if you are not satisfied of the defendant's guilt beyond a reasonable doubt, you should find him not guilty.

You will have for your convenience a form of verdict, omitting the venue and caption of the case, which reads as follows:

"We, the jury in the above-entitled action, do find the defendant, Thomas W. Banks, ———— guilty as charged in the first count of the indictment herein, 1945 and ———— guilty as charged in the second count of the indictment herein, 1946, and ———— guilty as charged in the third count of the indictment herein, 1947."

If you find the defendant guilty on all three counts you may use this form. It should be dated and signed by your foreman. If you find him not guilty on all three counts, you should write the word "not" in the blank preceding the word "guilty" as it appears on three lines in this form. You may find the defendant guilty on all three counts or not guilty on all three counts. You may find him guilty on any one count and not guilty on the others, or guilty on any two counts and not guilty on the other.

Your verdict must be unanimous.

Are there any exceptions, gentlemen? The jurors may retire for a brief recess and await the call of the Bailiff.

(Whereupon, the jury retired from the court room.)

The Court: Gentlemen, have you any exceptions —

Mr. Landrum: The Government has no exceptions or suggestions, Your Honor.

Mr. Graff: May I approach the Bench, Your Honor?

The Court: You may come forward if you desire.

(Whereupon, the following proceedings were had at the Bench:)

Mr. Kyle: May the record show that at the close of the testimony the defendant submitted certain requested instructions in writing, which are a part of the files in the matter, being numbered 1 to 14, inclusive. The Court at that time ruled on the requested instructions. The defendant excepts to the refusal of the Court to give requested instructions Nos. 1, 7, 11, 12, 13 and 14.

Mr. Hoffmann: I think the record should show that this is done before the jury retires to deliberate.

The Court: And out of the hearing of the jury, of course.

Mr. Kyle: The defendant excepts to the portion of the charge which stated that it was the duty of the defendant to keep books and records, that the law required him to keep books and records, that he failed to do so and that the jury had the right to consider that in determining the question of intent.

The defendant also excepts to that portion of the charge toward the end thereof where the Court said that if they found the defendant had income on which he did not pay a tax, they should find him guilty. That portion of the charge should have stated, so the defendant contends, that if the defendant had income on which he did not pay a tax, and if the jury found from the evidence that there was a wilful intent on the part of the defendant to evade or defeat the tax, that a verdict of guilty should follow, — the mere fact that he had income on which he did not pay a tax being not sufficient to constitute the offense charged in the indictment.

The defendant also excepts to that portion of the charge embodied in Government's requested instruction VIII, in which the Court stated in substance that although the defendant was charged with attempting to evade his taxes for the years 1945, 1946, and 1947 only, that the Court had nevertheless permitted evidence of like or similar transactions by the defendant for other years. The Court stated that such evidence could be considered by the jury only insofar as the jury might find it bore upon or related to the intent of the defendant with respect to tax evasion, if evasion or attempted evasion was found. In other words, the evidence was admitted for the purpose of showing or throwing light upon the state of mind or intent of the defendant. It is our position that the jury had no right to consider any

attempted evasion of taxes for those prior years for any purpose whatsoever in this case. When the exhibit in question was received, it was not received solely on the question of intent. That is, when I say the exhibit, I mean Exhibits 224 and 225 setting forth the amount of the alleged unreported taxes for those prior years.

The defendant excepts to that portion of the charge which embodied Government's requested instruction No. XI, which was in substance that the owner of a business need not be the actual bookkeeper to be familiar with the affairs and finances of that business, the Court stating that it would present a somewhat startling situation if a defendant, charged by law with the duty of filing a return, could sign and file a false return made to defraud the Government and escape punishment by disclaiming knowledge of that which he has sponsored. In view of the number of books and records in this case, including the books, records and returns of enterprises in which the defendant may or may not have had an interest, it is our position that that instruction should not have been given and tends to mislead the jury and prejudice the defendant.

Although the Court did give an instruction with respect to circumstantial evidence, the defendant excepts to the failure on the part of the Court to advise the jury that there was circumstantial evidence in this case and that the claims of the Government were based partly thereon.

Is there any objection to Mr. Graff taking some further exceptions?

The Court: Not at all.

Mr. Graff: The defendant takes further exception to that portion of the Court's charge where the Court stated that the United States has offered to prove that the defendant for each of the years in question filed an income tax return in which income tax return he stated his tax, and his net income to be a certain amount.

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The defendant excepts to that portion of the charge where the Court then stated, 'In other words, the defendant only declared a net income of so much and paid a tax of such amount.' The objection to the Court's charge in this respect is that the Court did not, in referring to that portion of the testimony, make clear that the ultimate decision of the fact questions involved was for the jury and the Court's charge in that respect invaded the province of the jury.

The defendant further excepts to the charge of the Court where the reference in the charge was made to the owner of a business, drawing the distinction that innocent clerical mistakes would, of course, be avoided and that a person would not be held responsible for innocent clerical mistakes, giving the impression that for any other mistakes which might be made, an offense might be made out under Section 145(b) of the Internal Revenue Code.

The defendant further excepts to that portion of the charge where the Court's charge stated that a man may not shut his eyes to obvious facts but he must exercise such intelligence as the situation warranted.

The Court: Have you any comment to make?

Mr. Landrum: If the Court please, Mr. Lord has very graciously suggested that Your Honor was possibly in error when you said that "If you find there was unreported income, you should find him guilty." Now, I don't know whether Your Honor said that or not, but if Your Honor did, possibly you would like to add to it that if such failure to report was wilful.

The Court: Well, I don't remember just what the instruction said.

Mr. Kyle: That was right down toward the end of it before you started talking about the forms of verdict.

Mr. Lord: That is right; it is the last page or two, I believe. I am not sure I heard it right.

Mr. Kyle: I made the same point here a few minutes ago on that.

The Court: You say that I told the jury that if he failed to report income, they should find him guilty, and you contend that I should have told the jury, "If he wilfully failed to report income" —

Mr. Lord: That is right, Your Honor.

The Court: I thought that is the way I said it. Well, I will make that correction. You may be seated.

Bring in the jury, Mr. Bailiff.

(Whereupon, the jury returned into the court room.)

The Court: Gentlemen of the jury, my attention has been directed to a possible error in the charge. I do not remember the exact language, but the point has been made that I instructed you that if income was received and not reported, you should find the defendant guilty for any one of the years in which the income was received. It is necessary to find that there was a wilful and knowing intention to evade and defraud the Government by failure to pay the tax. If you find that to be the situation, you should return a verdict of guilty for any one or all of the three years in question in which such a situation may be found.

The officers will come forward and take the oath.

(The officers were duly sworn.)

Gentlemen of the jury, this case is now submitted to you for your consideration and your verdict. You will retire to the jury room, select your own foreman, and in consultation together arrive at a conclusion as to what the verdict or verdicts should be in this case. You may retire with the officers.

The jury then retired to consider its verdict under the charge of the officers who were duly sworn and qualified to attend them. The jury is thereafter returned into Court, and being called and all being present and in the presence of the parties hereto, they do render their verdict herein and in the words and figures following, to-wit:

"UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

THOMAS W. BANKS,

Defendant.

VERDICT

We, the Jury in the above-entitled action, do find the defendant Thomas W. Banks, guilty, as charged in the first count of the indictment herein (1945); and guilty, as charged in the second count of the indictment herein (1946); and guilty, as charged in the third count of the indictment herein (1947).

Dated: May 30, A. D. 1952.

F. P. PADDOCK, Foreman."

Whereupon, it is by the Court

ORDERED: That defendant do appear in this Court for sentence when so ordered, and said matter is referred to the Probation Officer for investigation.

FURTHER ORDERED: That the jury be excused from further service.

(Caption of Action.)

NOTICE OF MOTION

TO: Philip Neville, United States Attorney
C. U. Landrum, Special Assistant United States Attorney
Miles W. Lord, Assistant United States Attorney
221 Federal Courts Building
Saint Paul 2, Minnesota

PLEASE TAKE NOTICE, that at the Federal Courts Building, 6th and Market Streets, Saint Paul 2, Minnesota, at a Special Term of said Court to be held on June 23, 1952, at 10:00 o'clock A.M., or as soon thereafter as counsel can be heard, the above-named defendant will move the Court as set forth in the attached motion.

HOFFMANN, DONAHUE & GRAFF
JEROME HOFFMANN
RICHARD E. KYLE
JOHN W. GRAFF
Attorneys for Defendant.

(Caption of Action.)

MOTION FOR A NEW TRIAL

The defendant hereby moves the Court to grant a new trial to the defendant on one or more of the following grounds:

1. A new trial is required in the interest of justice.
2. The verdict of the jury is against the clear weight of the evidence.
3. The verdict of the jury is contrary to the evidence.
4. The verdict of the jury has resulted in a miscarriage of justice.

5. The evidence lacks that degree of persuasiveness without which there should be no conviction.

6. Variance between the indictment, the bill of particulars and the proof at the trial.

7. Denial of request for a bill of particulars.

8. Denial of request to dismiss indictment because indictment was based upon improper and insufficient evidence before the grand jury.

9. Error of law occurring at the trial in dismissing the juror, Milton W. Bauman, after he had been accepted as a juror and duly sworn as a regular juror in this case.

10. Errors of law occurring at the trial in the reception of oral testimony over objection on the part of the defendant.

11. Errors of law occurring at the trial in the reception of exhibits over objection on the part of the defendant.

12. Errors of law occurring at the trial in the refusal of the Court to strike certain testimony which was received.

13. Errors of law occurring at the trial in the refusal of the Court to withdraw exhibits or portions which had theretofore been received into evidence.

14. Errors of law occurring at the trial in the refusal of the Court to grant a judgment of acquittal at the close of the plaintiff's evidence and at the close of the evidence in the case.

15. Errors of law occurring at the trial in the refusal of the Court to give certain instructions to the jury as requested by the defendant.

16. Errors of law occurring at the trial in the giving of certain instructions to the jury and duly excepted to by the defendant before the jury retired to consider its verdict.

17. Errors of law occurring at the trial in the arguments of counsel for the plaintiff at the trial.

18. Such other events, happenings, occurrences at and during the trial which militated against the defendant having a fair trial.

Said motion will be made upon all the files and proceedings heretofore had in the above-entitled matter and upon such further affidavits, oral and documentary evidence as may be adduced at the time of hearing.

HOFFMANN, DONAHUE & GRAFF
JEROME HOFFMANN
RICHARD E. KYLE
JOHN W. GRAFF

Attorneys for Defendant

Proceedings had in the foregoing entitled matter before the Honorable Robert C. Bell without a jury on June 23, 1952.

Appearances are as has been heretofore noted.

(Statement made by Mr. Kyle.)

(Statement made by Mr. Graff.)

(Statement made by Mr. Lord.)

The Court: I shall not undertake to extend my remarks or deliver an opinion on this matter at this time. I have been much interested in the arguments that have been presented because I have been very greatly interested in this case since it came before me the first time. I have read many of the decisions that have been cited in these arguments here today and I think I am fairly familiar with the

principles that have been laid down in the decisions of the courts and in the statements of counsel.

It is seldom a case is tried, I think, covering a period of two weeks, where there is a vast amount of evidence introduced, where many exhibits are received, without leaving the way open so that arguments may be made pro and con that the trial court has made errors in certain rulings, that counsel have made errors in remarks and in comments during the trial that are erroneous, and even reversible error.

The rules of law for the trial of cases permit the record to be made and they permit consideration of the record that has been made. They provide for appeals so that if the trial court has erred, the errors may be corrected. I have been interested in some of the issues that have been discussed here by counsel. But this case, like many others that I have tried in the last nineteen years, convinces me that it is difficult to make a perfect record in the trial of cases in receiving evidence, in excluding evidence, in instructing a jury, and in permitting comments by counsel for the government or for the defendant.

In view of this situation, I feel that this Court at this time must overrule the motion for a new trial, Mr. Clerk, and an appropriate order may be made to that effect.

Mr. Lord: I should like at this time to move for sentencing, Your Honor.

The Court: The defendant may come forward.

(The defendant appeared before the Bench.)

The Court: You were ably defended in this case by good lawyers, experienced trial lawyers. I think you had a fair trial. This Court made every effort to see that you did have a fair trial. The jury was removed from contact with the outside world as nearly as possible so that they might not be influenced either way by reading or talking to anyone from whom they might get any information. You were en-

titled to have this case decided on the evidence that was offered here in this trial. Your lawyers undertook to see that nothing except competent, material evidence was received for the jury's consideration.

This is one of the unpleasant duties that I have to perform. This Court has no unkindly feeling for you. I regret that this case came before me and that it has been in the courts. I think there is no official in the government who wants to abuse you in any way, these investigators or anyone else, but this Court has a duty to perform to the public as well as to you and that is the duty that I am confronted with at this time.

If I thought that it would make any difference, another week or two would not be so important, but I thought counsel had been informed that I would consider the motion for a new trial today and if it were overruled that sentence would be imposed. The courts have to make progress in these matters. There is much business before the Courts. I have to be in Winona yet this evening so I can appear in court tomorrow morning, and we have to eliminate some of these cases that have been tried, get rid of them, so as to be ready for the cases that are still to come. That is the reason why I have been here all afternoon without even a recess of a few minutes.

Now, I can eliminate from my consideration comments that I may have heard in the past, I can eliminate from consideration the fact that there are many tax cases in the courts of the country at this time, and there are many persons who are charged with a violation of the tax law. I am concerned with the facts as shown by the evidence in this case. Here is a tax case prosecuted by the government of the United States against you in which it appeared that—I think in the first place—forty odd thousand dollars was not reported. I think by the time the trial of the case was ended it was some $32,000,—a considerable sum of money.

That was for three years, and there had been a number of years in addition to that constituting a total period of some ten years that the government is claiming additional taxes. They claim that you intentionally and unlawfully evaded the payment of those taxes.

Well, three years were involved in this suit and the facts were submitted to a jury of good citizens, I think. I am confident of that, because the officers of the Court undertake to secure fair, unbiased, unprejudiced jurors. This Court undertook to do likewise. So there is no recourse except for this Court to impose some sort of a sentence commensurate with the facts and the law.

As punishment for the offense to which the defendant Thomas W. Banks has been convicted in this case, it is the judgment and sentence of this Court that he be and he hereby is, as a general sentence on the three counts of the indictment, committed to the Attorney General or his duly authorized agents for imprisonment in an institution of the penitentiary type for a period of three years, and to pay a fine of $10,000.00.

Persons charged and convicted of a violation of the law often are placed on parole. That situation, that provision of the law must be taken into consideration by the courts. One-third of your sentence now is one year. I am not saying that the Parole Board will parole you at the end of a year. I do not know. That is their duty. This Court has no supervision, no jurisdiction over a matter of that kind. I just wanted you to know that there is a provision of the law which will terminate your service, or that may possibly terminate your sentence, the service of your sentence, at the end of one-third of the time.

Now, is there a continuing bond in this case?

Mr. Graff: Yes, it is a continuing type of bond, Your Honor. I had no idea that sentence was going to be imposed today.

The Court: Well, I desired to avoid remanding this defendant to the Marshal.

Mr. Graff: I appreciate that, Your Honor.

The Court: That is why I am asking you that question.

Mr. Graff: May there be a stay and his bond continue for such reasonable period of time as the Court may suggest?

The Court: Mr. Clerk, is the bond here?

(Discussion off the record.)

The Court: Now, this bond may remain in force and effect until on or before the 1st day of July. If you desire a supersedeas bond, you might say so at this time.

Mr. Graff: Well, while I have not had an opportunity of conferring with associate counsel, I am sure the Court appreciates that there are some good legal questions involved and I think they present rather substantial questions which we may want to present to have reviewed. The Court said he had to go to Winona again tonight, as I understand it?

The Court: Well, that is correct, but I am here to finish the job in this case.

Mr. Graff: On the assumption that there will be an appeal, Your Honor, does the Court care to indicate whether a bond would be allowed on appeal and the amount of such bond? In that event, it is my understanding there would have to be a new bond.

The Court: A supersedeas bond may be given by this defendant because of his right to appeal and to remain at liberty during the pendency of that appeal.

Mr. Graff: Thank you, Your Honor.

The Court: That is generally done and this Court's attitude in cases of this kind. I think I have never required

a defendant to serve time in prison if he was taking an appeal, where substantial questions are involved or may be involved. So this appeal may be taken and a supersedeas bond may be given. It should be drawn with a bail bond for his liberty, and a supersedeas bond in this case. It should be a larger bond than he is now under. I think a bond drawn so as to assure him of his liberty, and the supersedeas feature, should be $35,000.00.

(Caption of Action.)

NOTICE OF APPEAL

1. *Name and Address of Appellant.*

Thomas W. Banks
3817 Drew Avenue, South
Minneapolis, Minnesota

2. *Name and Address of Appellant's Attorneys.*

Jerome Hoffmann
1220 Minnesota Building
Saint Paul 1, Minnesota

Richard E. Kyle
W-2162 First National Bank Building
Saint Paul 1, Minnesota

John W. Graff
1220 Minnesota Building
Saint Paul 1, Minnesota

Hoffmann, Donahue & Graff
1220 Minnesota Building
Saint Paul 1, Minnesota

3. *General Statement of Offense Charged.*

Willful attempt to evade and defeat income taxes due and owing by appellant to the United States for the

calendar years 1945, 1946 and 1947 in alleged violation of 26 U.S.C.A. 145(b).

4. *Concise Statement of Judgment, Date Thereof and Sentence Imposed.*

Said Judgment reads in part as follows:

"On this 23rd day of June, 1952, came the attorney for the Government, and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offenses of attempting to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar years 1945, 1946 and 1947 as set forth in each of the three counts of the indictment in violation of Title 26, Section 145(b) U. S. Code, as charged in the indictment herein, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced and no sufficient cause to the contrary being shown or appearing to the Court.

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years and that he do pay a fine of Ten Thousand ($10,000.00) Dollars."

5. *Statement as to Confinement or Bail.*

Appellant has been released on bail.

6. *Statement of Appeal by Appellant.*

I, Thomas W. Banks, the above named appellant, hereby appeals to the United States Circuit Court of Appeals

for the Eighth Circuit from the above stated judgment. Dated: June 30, 1952.

THOMAS W. BANKS, Appellant

(Caption of Action.)

BOND ON APPEAL

KNOW ALL MEN BY THESE PRESENTS:

That we, Thomas W. Banks, as principal, and Morris Kieffer and Isadore Kieffer, as sureties, are held and firmly bound unto the United States of America, in the full and just sum of THIRTY-FIVE THOUSAND AND NO/100 ($35,000.00) DOLLARS, to be paid to the United States of America, to which payment well and truly to be made we, and each of us, do hereby bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 26th day of June, 1952.

WHEREAS, at the April Term, 1952, of the District Court of the United States for the District of Minnesota, Third Division, in a cause pending in said Court between the United States of America, as plaintiff, and said Thomas W. Banks, as defendant, a judgment and sentence was rendered against the said Thomas W. Banks, and the said Thomas W. Banks has appealed to the United States Court of Appeals for the Eighth Circuit to reverse the judgment and sentence in the aforesaid cause, and

WHEREAS, THE CONDITIONS OF THE ABOVE OBLIGATION ARE AS FOLLOWS:

(1) The said Thomas W. Banks shall appear either in person or by attorney in the United States Court of Appeals for the Eighth Circuit on such day or days as may be appointed for the hearing of said cause in said United States Court

of Appeals and prosecute his said appeal and shall abide by and comply with all orders made by said United States Court of Appeals in said cause, and

(2) If the judgment and sentence appealed from are affirmed, or if said appeal is dismissed, the said Thomas W. Banks shall surrender himself as said United States Court of Appeals shall direct in execution of the judgment and sentence entered under date of June 23, 1952 by said United States District Court in said cause and the said Thomas W. Banks shall pay the fine imposed by said judgment and sentence entered under date of June 23, 1952 by said United States District Court in said cause, and

(3) If the judgment and sentence appealed from is reversed, the said Thomas W. Banks shall appear for trial in said United States District Court on such day or days as may be appointed for a retrial by said United States District Court and shall abide by and comply with all orders made by said United States District Court,

NOW, if the foregoing conditions are complied with, then the above obligation is to be void, otherwise the above obligation is to remain in full force and effect.

THOMAS W. BANKS (Seal)

MORRIS KIEFFER (Seal)

ISADORE KIEFFER (Seal)

STATE OF MINNESOTA)
COUNTY OF RAMSEY) ss.

MORRIS KIEFFER, one of the sureties described in and who executed the foregoing bond, being first duly sworn, upon oath says that he is a resident of and freeholder in said State and worth the sum of SEVENTY THOUSAND AND NO/100 ($70,000.00) DOLLARS, above all debts and liabili-

ties and exclusive of his property which is exempt from execution.

MORRIS KIEFFER

Subscribed and sworn to before me this 26th day of June, 1952.

WILLIAM H. ECKLEY
Deputy Clerk
U. S. District Court
District of Minnesota

STATE OF MINNESOTA)
COUNTY OF RAMSEY) ss.

ISADORE KIEFFER, one of the sureties described in and who executed the foregoing bond, being first duly sworn, upon oath says that he is a resident of and freeholder in said State and worth the sum of SEVENTY THOUSAND AND NO/100 ($70,000.00) DOLLARS, above all debts and liabilities and exclusive of his property which is exempt from execution.

ISADORE KIEFFER

Subscribed and sworn to before me this 26th day of June, 1952.

WILLIAM H. ECKLEY
Deputy Clerk
U. S. District Court
District of Minnesota

STATE OF MINNESOTA)
COUNTY OF RAMSEY) ss.

On this 26th day of June, 1952, before me personally appeared Thomas W. Banks, Morris Kieffer, Isadore Kieffer, to me known to be the persons described in and who executed

the foregoing bond, and they acknowledged that they executed the same as their own free act and deed.

WILLIAM H. ECKLEY
Deputy Clerk
U. S. District Court
District of Minnesota

The foregoing Bond is hereby approved this 30th day of June, 1952.

ROBERT C. BELL
United States District Judge

(Caption of Action.)

NOTICE OF MOTION

TO:

Philip Neville, United States Attorney
C. U. Landrum, Special Assistant United States Attorney
Miles W. Lord, Assistant United States Attorney
221 Federal Courts Building
Saint Paul 2, Minnesota

PLEASE TAKE NOTICE, that at the Federal Courts Building, 6th and Market Streets, Saint Paul 2, Minnesota on September 10th, 1952, at 10:00 o'clock A.M., or as soon thereafter as counsel can be heard, the above-named defendant will move the Court as set forth in the attached motion.

HOFFMANN, DONAHUE & GRAFF
JEROME HOFFMANN
RICHARD E. KYLE
JOHN W. GRAFF
Attorneys for Defendant

(Caption of Action.)

MOTION FOR REDUCTION OF SENTENCE

The above-named defendant hereby moves the Court as follows:

For a reduction of the sentence imposed upon the defendant under date of June 23, 1952.

For the suspension of the execution of the sentence imposed upon the defendant under date of June 23, 1952, and the placing of the defendant on probation.

Said motions are made pursuant to Rule 35 of the Federal Rules of Criminal Procedure, the Federal Probation Act and upon all the records, files and proceedings heretofore had in the above-captioned matter and upon such further material as may be adduced at the time of the hearing.

HOFFMANN, DONAHUE & GRAFF
JEROME HOFFMANN
RICHARD E. KYLE
JOHN W. GRAFF
Attorneys for Defendant.

ORDER

(Caption of Action.)

The above named defendant on September 10, 1952, at the Federal Courts Building, St. Paul, Minnesota, presented to the undersigned Judge of this Court a motion for an order modifying the sentence and for suspension of the sentence and the application of probation under the Federal Probation Act.

Mr. C. U. Landrum, Special Assistant United States Attorney, and Mr. Miles W. Lord, Assistant United States

Attorney for the State of Minnesota, appeared for the United States.

Mr. John W. Graff and Mr. Jerome Hoffmann appeared for the defendant.

The foregoing motion was considered by the Court and overruled on September 26, 1952, on which date the court filed herein its opinion. The court of its own motion orders that its said opinion signed on September 26, 1952, be and it hereby is withdrawn, set aside, and for naught held and in lieu thereof the court files a supplemental opinion copy of which is hereto attached and made a part hereof.

Dated: October 20, 1952 at St. Paul, Minnesota.

By the Court:

ROBERT C. BELL

United States District Judge.

The opinion of the District Court on the Motion to modify the sentence is reported in 108 Federal Supplement 14. This opinion is incorporated into this record by reference thereto with the same force and effect as if it were reprinted herein.

(Caption of Action.)

MOTION

The above-named appellant hereby respectfully requests an order of this Court extending the time within which the printed record and printed brief may be filed to and including October 15, 1952.

HOFFMANN, DONAHUE & GRAFF
JEROME HOFFMANN
RICHARD E. KYLE
JOHN W. GRAFF
Attorneys for Appellant.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 14,648

September Term, 1951.

THOMAS W. BANKS,

Appellant,

vs.

UNITED STATES OF AMERICA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA.

On motion of counsel for appellant it is Ordered by this Court that the time within which the printed record and printed brief of appellant may be filed in this Court in this cause is hereby extended to and including October 15, 1952.

August 22, 1952.

(Caption of Action.)

MOTION

The above-named appellant hereby respectfully moves the Court for an order as follows:

(1) Setting the above-captioned case for hearing at the March, 1953 term of this Court and giving it an early date for argument.

(2) Extending the time within which the printed record may be served and filed to and including November 15, 1952.

(3) Extending the time within which the appellant's brief may be served and filed to and including December 15, 1952.

(4) Extending the time within which the appellee's brief may be served and filed to and including February 1, 1953.

(5) Extending the time within which appellant's reply brief may be served and filed to and including February 15, 1953.

HOFFMANN, DONAHUE & GRAFF
JEROME HOFFMANN
RICHARD E. KYLE
JOHN W. GRAFF
Attorneys for Appellant.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 14648

September Term, 1952

THOMAS W. BANKS,

Appellant,

vs.

UNITED STATES OF AMERICA.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA.

On motion of counsel for appellant, no objection having been filed by counsel for appellee, this cause will be placed on the calendar for hearing at the March, 1953 session of this Court, and briefs may be filed at the times indicated in the motion.

October 3, 1952.

(Caption of Action.)

STIPULATION

IT IS HEREBY STIPULATED AND AGREED, by and between the above-named parties through their respective counsel, as follows:

1. That the time within which the printed Record in the above-captioned case may be served and filed is extended to and including December 31, 1952.

2. That the time within which the appellant's Brief may be served and filed is extended to and including January 24, 1953.

3. That the time within the appellee's brief may be served and filed is extended to and including Febraury 24, 1953.

4. That the time within which the appellant's reply brief, if any, may be served and filed is extended to and including any time before argument of said cause. It is

FURTHER STIPULATED AND AGREED, by and between the above-named parties through their respective counsel that an Order may be entered setting such times for the filing of the Record and Briefs.

PHILIP NEVILLE
United States Attorney
Attorney for Appellee

JEROME HOFFMANN
RICHARD E. KYLE
JOHN W. GRAFF
Attorneys for Appellant

(Caption of Action.)

STIPULATION

IT IS HEREBY STIPULATED AND AGREED, by and between the above-named parties through their respective counsel, as follows:

That the original exhibits introduced and received in evidence in the trial of the above-captioned case may be filed in the United States Court of Appeals for the Eighth Circuit and upon being so filed, they are to be regarded as being part of the record on the appeal of said case; that the Clerk of this Court hereby be authorized and directed to forward to the Clerk of the United States Court of Appeals all of said exhibits, but said exhibits are not to be forwarded until ten (10) days prior to the opening of the March, 1953, term of said United States Court of Appeals for the Eighth Circuit; and that the above-named Court may make and enter the attached proposed Order without any other or further notice to the parties or their attorneys.

PHILIP NEVILLE
United States Attorney
Attorney for Appellee

JEROME HOFFMANN
RICHARD E. KYLE
JOHN W. GRAFF
Attorneys for Appellant.

(Caption of Action.)

ORDER

Pursuant to the attached foregoing stipulation of the parties through their respective counsel,

IT IS HEREBY ORDERED:

That the Clerk of this Court be and he hereby is authorized and directed to forward to the Clerk of the United States Court of Appeals for the Eighth Circuit at St. Louis, Missouri, all exhibits introduced and received in evidence in the trial of the above-captioned case and that such exhibits are to be forwarded ten (10) days prior to the opening of the March, 1953, term of said United States Court of Appeals together with a certified copy of the foregoing Stipulation and Order.

ROBERT C. BELL

United States District Judge.

BLEED THROUGH POOR COPY

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In the United States Court of Appeals
for the Eighth Circuit

No. 14,648 Criminal

THOMAS W. BANKS, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

EXCERPTS FROM TESTIMONY OF JOSEPH A. O'GORDON

(Tr. 156-157)

By Mr. LORD:

Q. Mr. O'Gordon, during the fall of 1950, did you have occasion to go to the office of Arthur Stone, the head of the Special Agent of the Bureau of Internal Revenue?

A. Yes.

Q. Did you there with Mr. Stone, Mr. Meshbesher, Agent George McKusick, Agent Arthur Thomas, discuss matters concerning the income tax liability of Thomas W. Banks?

A. Yes.

Q. Did you then request that those officers furnish you with a list of questions and that you would then submit the questions to Mr. Banks and return his answers?

Mr. GRAFF: Just a moment. I will object to the question as leading and suggestive.

The COURT: Oh, you may answer the question.

A. I answer the question, yes, but it did not originate with me.

Mr. LANDRUM: The answer is yes?
The WITNESS: Yes, it was discussed, yes.

Q. (By Mr. LORD) And did you agree to take these questions to Mr. Banks and return with the answers?

Mr. GRAFF: Just a moment. That is objected to as leading, Your Honor.
The COURT: You may answer.

A. I do not recall ever—I do not remember suggesting that I would take them to Mr. Banks but I did agree that we would accept the questions and try to answer them, for the purpose of settling a civil tax——
Q. (By Mr. LORD) I am going to ask you for a yes or no answer.
A. Yes.

• • •

(Tr.166)

Q. (By Mr. LORD) Now, Mr. O'Gordon, I hand you Government's Exhibit 70, and Government's Exhibit 71, and ask you to study those exhibits carefully and to compare the answers contained on Government's Exhibit 71, with the questions contained on Government's Exhibit 70 and to determine whether or not the answers set out there are set out opposite the questions which they purport to answer?
A. (Witness complies.)

The COURT: Have you about finished with your examination? Is there a question pending? If so read it.

(The question was read.)

Mr. LORD: Would the reporter please read the question.
The COURT: Read the question, Mr. Reporter.

(The question was reread.)

A. Exhibit 71 answers the questions, and they were answered by us.

Q. (By Mr. LORD) What is your answer to the question which I have put to you? Does Exhibit 71 contain the same answers that you have seen on Exhibit 70?

A. Yes.

EXCERPT FROM TESTIMONY OF F. J. WICKERS

(Tr. 296-297)

Q. Then this check represents a payment of $4,500.00, plus $180.00 interest?

A. That is right.

Mr. LORD: At this time, Your Honor, I offer in evidence Government's Exhibit 112.

The COURT: It is received.

Q. (By Mr. LORD) Now, Mr. Wickers, I note that on the reverse of Government's Exhibit 112 it bears only your own endorsement, is that correct?

A. It has my endorsement on top, yes.

Q. And whose endorsement is underneath?

A. That is my father.

Q. Well now, what does that demonstrate with reference to the manner in which that check was cashed?

A. Well, it represents that my father cashed the check for me at the bank.

Q. And what did he do with the proceeds?

A. He gave the money to me.

Q. How much of the money?

A. $4,680.00.

Q. And what did you do with the money?

A. I turned the money over to Mr. Banks.

Q. Did you say Mrs. or Mr. Banks?

A. I believe I—at the time I gave it to Mrs. Banks.

Q. It represented a loan from Mr. Banks, however, you stated ?

A. That is right.

Q. And that was on approximately the date which the check bears, was it not?

A. That is right.

Q. You mean, then, to say that you gave Mrs. Banks $4,680.00 in cash?

A. That is right.

Q. On approximately March 12, 1948?

A. That is right.

EXCERPT FROM TESTIMONY OF LEONARD H. WEINSTOCK

(Tr. 579-582)

Q. Did either Thomas Banks or Rita Banks ever furnish you with any personal account books?

A. No.

Q. Would you be good enough to tell us just what kind of information Thomas Banks brought to you himself from which you prepared his income tax returns?

A. Such income as he had from what was called as "the book," the Pearson News, was given to me by Mr. Banks personally.

Q. Now, such information as he had from what is called the book, the Pearson News, was given to you by Mr. Banks, is that correct?

A. That is correct.

Q. In what form was it given to you?

A. Usually it was on an adding machine tape.

Q. Then, as I understand it, as Mr. Banks—I do not want to lead, I am sorry—insofar as the Pearson News angle of the matter is concerned, he would bring you a tape from an adding machine?

A. That is right.

Q. And was there anything there to indicate the source of that income?

A. No.

Q. Did you know the source of it?

A. He told me.

Q. What was it?

A. He said it was wagering.

Q. Wagering?

A. Yes, sir.

Q. That is the same thing as gambling, isn't it?

Mr. GRAFF: Just a moment. Objected to as argumentative.

The COURT: Well, you need not answer the last question.

Mr. LANDRUM: All right.

Q. (By Mr. LANDRUM) And that was what Mr. Banks brought you to incorporate in your income tax returns insofar as his income from what we know as Pearson News Service was concerned?

Mr. GRAFF: Just a moment. I will object to that on the ground that it is repetition and it is leading and suggestive.

The COURT: You may answer.

The WITNESS: May I hear the question?

The COURT: Read the question.

(The question was read.)

A. Yes.

Q. (By Mr. LANDRUM) Now, Mr. Weinstock, could you tell us, to the best of your knowledge, during the years that you made up Mr. Banks' income tax returns, up to and including the year 1947, and no further, about what proportion of his income which you made the returns for was derived from wagering?

Mr. GRAFF: Just a moment. We will object to that on the ground that that is not the best evidence. The returns would be the best evidence of that fact, which are in evidence.

The COURT: I think this witness may answer that question, if he can.

Q. (By Mr. LANDRUM) Just your best judgment.

A. As a general question, it is quite hard to answer it because there are various things included in there, sales of property and so forth.

Q. I was asking you about wagering, what proportion?

A. What proportion? I could not answer that without knowing what else was in the tax returns in those years.

Q. Mr. Weinstock, is it fair to say that a rather large proportion of it was wagering?

Mr. GRAFF: Just a moment. We will object to it on the ground that it is leading and suggestive and further objected to on the ground that it is not the best evidence. The tax returns are in evidence and I assume that they would be evidence of that fact.

Mr. LANDRUM: I will withdraw it, Your Honor. The returns are in evidence.

Q. (By Mr. LANDRUM) In connection with these returns which you made out and in which you included amounts for wagering, was there any information given to you as to the source of any particular money that was included in the total?

A. No.

ARGUMENT

By Mr. HOFFMANN

Mr. HOFFMANN: Your Honor, and Members of the Jury, I suppose that it is to you now quite obvious and apparent the responsibility that rests upon lawyers representing a taxpayer or a person charged with any offense. I am sure you appreciate that there is in the entire field of human affairs and human relations no other such relationship. In its intimacy, its responsibility—by this relationship one asks another for the time being for this purpose, if you please, to be his mind, to be his voice, to be his conscience.

We then—Mr. Kyle, Mr. Graff and myself—have become counsel for the taxpayer. Counsel for the plaintiff, three in number, sit here (indicating). This responsibility rests heavily upon us, and as part of our responsibility and task it has become our responsibility to determine the method of procedure in this case,—the manner, if you please, of its presentment to you. We have without hesitation on the basis of our oaths as officers of this Court assumed that responsibility. The method of presentment and procedure as to determination has been ours. If you find fault with it, blame us: do not blame the taxpayer. Blame us, but attribute it, if you will, to an overindulgence, at the best, of zeal on our part for our cause and for our

client. And believe, if you will, that we are in this case doing as lawyers for our client the kind of job that everybody in this room would desire to have done for him or for her by their lawyers.

If anything we have done or anything we have said throughout the trial of this case, or from the very second until its completion, has met or does meet with your displeasure, again we ask you to charge it to us, the attorneys, and not to the taxpayer. It is our fault, our responsibility.

It is apparent to you now, I am sure, as it must be to every person in the court room, that when the forces of the government are directed at one person, they are almost overwhelming—whoever might be that person.

They descend upon you like an avalanche and it would appear you stand there almost helpless. But fortunately long ago at the very day of beginning of the country itself, it was constitutionally declared and ordained that people in that position would not stand alone or stand unprotected. They were given certain cloaks of protection to wrap and drape themselves in. Reversed principles that are without beginning in law speak for a person at such a time. They declare in thunderous voice that he shall be tried under certain prescribed forms and rules; that he shall have the right of trial by jury, and that he shall be presumed innocent until the avenue of every presumption that he is innocent is sealed by proof.

Now, those my friends, are not idle, empty words. On Memorial day, 1952, we find ourselves here,—the one day that is so typically American that throughout the world it represents America. Your government and my government is only you, and you, and you, and you, and you, and me. There is nothing mystical or overwhelming about the phrase "the Government of the United States." It is nothing more than a collection of all of us. It is us, and I say that our government exists and will exist as it does only because it has and only because it must be bigger than any individual. If the government of this country ever gets to the point where it overwhelms and demolishes the dignity and the individuality of a person, all is lost, all is

gone; "iron curtains" have descended in front and in back of us.

The dignity, the respect of an individual in this country, is what makes it different than Russia, than China, than Northern Korea. That is what we must maintain. That is why the judicial system in country was invoked and maintained, and when I say, as I will repeatedly, certain principles of law are ordained and proclaimed and they abide with this taxpayer throughout this trial, they are not empty words to be bandied around in a court room. People gave their lives for them in terms of thousands and thousands of people over not scores but hundreds of years.

And so in this case, as the Court told you following Mr. Landrum's opening statement, it is by law declared that the return of the indictment in this case is in no manner and to any degree evidence of guilt on the part of the tax payer. You must not consider it as such. If you do, you violate your oath. You destroy the dignity and respect of the individual. You tear out the cornerstone of the edifice called the Government of the United States.

And he likewise told you, did His Honor, Judge Bell, that the taxpayer is presumed to be innocent, and those are not idle words. I can only point out to you the true significance of those words, the deep, the full meaning of them, the complete protection they reflect and represent by suggesting to you that if any person in this court room stood accused of the commission of any crime and was on trial in court, visualize if you will a little old lady clothed in gray called justice, who stands there with her hand out above that person's head from the very beginning of the trial until its completion, my friend, and who keeps repeating audibly, if you will, "You are innocent, you are innocent, you are innocent, you are innocent"—ad infinitum, until and during all of the testimony, and those words must ring in your ears and that protection must by you be given to the taxpayer or you destroy the purpose of our country.

Taxes are important. Their assessment and collection are imperative for the maintenance of the country. I will concede that. But I say that all the treasuries filled with

taxes, all the wealth in the states represented by individual holdings transferred to the government, would be as nothing but gall in your mouth and my mouth if by the collection of taxes alone the purpose of government was accomplished.

Let me suggest that taxes, as important as their collection after assessment and determination be, other things are of importance. To me it would be less satisfying to live in Russia and have the tax collector come out into the street and say, "I shall take 80 bushels of your wheat."—even before you plant it than to have in America the right of trial by jury and presumption of innocence.

Then there is one more cloak of protection this taxpayer has, and again I don't talk idle words or make empty gestures. His Honor as part of the law in this case will tell you these things abide with the taxpayer throughout this trial, that they are ordained, proclaimed law of this country, and that it never becomes the duty of a person accused of the commission of any crime when on trial to prove his innocence. Think of what a beautiful thing that is, in the light of your understanding of the trial of the Catholic clergy in Austria and the other people in the other countries. You don't prove your innocence. The law says it is this kind of country; the law declares it is this kind of country.

Again we are back to the basic thing of the country, the individual's respect and individuality. And so the law carefully and wisely and prudently says, "If you level a charge in any criminal court room against any person charging the commission of any crime, high or low, you must prove the commission of the crime with respect to every essential element of the crime beyond all reasonable doubt.

The Court will explain the term "reasonable doubt" to you. I am sure after you listen to it that you will understand it as I do to mean substantially this—nothing more and nothing less—by proof beyond a reasonable doubt is meant testimony of such a character and nature as will impress the minds of ordinary prudent men and women with a conviction upon which they would act without hesitation in the most important affairs and concerns of their own lives. Understand that term, abide with it, apply it to the

evidence in this case, and you will find that the ruler is longer than the garment that was cut to fit the taxpayer.

It doesn't fit the requirement of proof. I don't like my government to be unfair in any respect. Neither do you. You don't want it to be unfair to anyone, to anyone at all in this room, or in any room, or on any street. The government is too big to lend itself to that kind of practice. The government in this kind of case can only act through its agents, or officers, or employees. Ask yourselves, with the greatest of frankness and sincerity—and answer yourselves—Did the government act in good faith throughout this trial?

At the very opening of the case last week the government, through its testimony of agent McKusick, threw out to you this statement: "I started on April 2, 1946 with a group of agents to investigate graft payments to public officials in the City of Minneapolis, including the taxpayer."—and they left that statement there for you. I like to consider—as I see it and I am one for speaking frankly and declaring my mind—I like to consider it as the "shot of poison" they wanted you to have in your arm and in your mind as you began to hear the testimony in this case. Later on it was developed on cross-examination of Mr. McKusick by an emphatic answer on his part, "No, I found no evidence of payments of graft by this taxpayer."

But for several days, and for several reasons as I would see it, they wanted that thought to linger in your mind. They wanted you to sit there looking at him, the taxpayer, as testimony was adduced in behalf of their case, tagged and tainted with the brush of suggestion,—an "old wives' tale" is the expression he used,—150 old wives he ran down and got tales from, and he came in here and suggested you were concerned with a person in the person of the taxpayer who was a graft payer to public officials. And they knew he hadn't—they knew as surely as we all sit or stand in this room the taxpayer hadn't done that. He finally told you. Is that, my friends, the candor,—is that, my friends, the frankness,—is that, my friends, representative of the kind of government agent you want to deal with you?

Take these figures on their charts. Do they for a moment suggest to you that we are afraid of any exhibit in this case? Do they think that we are afraid of Exhibit 33, afraid of Exhibits 70 and 71, the clever and little questions propounded by the man who sought to taint someone with a brush that didn't concern him? Twenty-eight questions were propounded and his answer was finally, as an accountant, "I knew the answers before I submitted the questions."—your government, your government, your government,—"and all I wanted was a grain of evidence for the attorney."

I want my government to be bigger than I am. I have a right to expect that my government will be bigger than I am,—not smaller than I am, or smaller than a worm!

What was the meeting for that set up in Mr. Stone's office in the fall of 1950 that resulted in the preparation of Exhibit 70 and the answers represented by Exhibit 71? Intent to conceal by the taxpayer? Determination to evade by the taxpayer? Consider the absurdity. Reflect upon the fallacy of the contention, as demonstrated by the very exhibits they ask you to use as the noose to hang him,—Exhibits 70 and 71,—the very answers that they have converged down into this chart, and let's talk about the chart. I think they thought we wanted to evade that chart and distract attention from it. To me the chart is symbolic of the old days when the Orpheum Circuit maintained, and you used to go in and you would buy a seat in the gallery for a quarter, and out would come Jack Benny—when he still had his hair—and he would play the violin, and behind him was a painted fly, as they call it, or drop and it was made up then and made up now of the same material, canvas with paint, and Jack Benny would stand in front of what purported to be a sofa, in what pretended to be a room, before what pretended to be wallpaper, and he would play the violin, and all the time you knew and I knew, siting on your quarter seat, that it was not a davenport, that it was not a parlor, that it was not really wallpaper, but that it was a piece of canvas!

I am for hanging people from substantial scaffolds. I

don't like to build a scaffold out of pencil points and paint brushes and canvas. I don't like my government asking twelve people to determine the serious rights of this taxpayer based upon calculations founded upon speculation,—assumed from conjecture, if you will, sir. What do you know about this Exhibit 225 as to its sources of information? I know so much it nauseates me. I know it from what was said on this witness stand, and let me tell you what was said as to where the information that there is reflected came from,—the very information as to the last three lines that they say, "pull it around his neck."

It was testified that this chart was made up in the spring of 1951, one year ago, except that he said last Friday night, one week ago today, he made some minor alterations and changes, and he tells you, "I made that chart up, based upon all of the exhibits in this case." There weren't any exhibits in this case last May,—all of the exhibits had not been introduced last Friday. "I made up this exhibit, this chart, from those exhibits, from all of the testimony in this case." There was important testimony here Saturday and Monday after he told you that. And finally he went so far—and this is what I want you to heed and never forget. You will remember it and if you convict this taxpayer, it will haunt you the rest of your days. You will have many sleepless nights. You will wake up in the cold dawn of many mornings and shudder to think of what you accomplished, or lended yourself to, if you convict this taxpayer. He then said, this witness, the agent of the government—your government and mine—that the chart was made up from all of the testimony and all of the exhibits, but finally he was driven by Mr. Graff to saying, "Well, I put that away and I took this out of the testimony. I rejected part; I accepted part." He is going to tell you what testimony to believe, because he prefers to believe that part and reject some other.

But he went further than that. Then he told you out of a clear sky yesterday that it also represented his conclusions, "and the conclusions of my"—his very words, so help me—"my associates." And who were his associates?

It has always been by me considered elemental and in all fairness that a person who makes a charge against someone, or who participates in the making of that charge, should have the temerity and the courage to face the person he accuses. I don't like people talking about me behind my back. If it is true, I want them to tell me to my face. If it is true, I deserve it. If I am wrong, I can't explain it; if I am right, I don't need to explain it.

It represented the conclusions of his associates. Those are four things now. Then he went further and he said it also represented his interpretation or acceptance of certain information from a report of certain agents made back in 1936 or '37,—a report not in evidence. You don't know what agents interpreted what conduct or what transactions, or placed what interpretation upon their subject. Then he went further and he told you that it also represented in part his conversation with some agent in New York, or his understanding of what that agent in New York found in that connection with respect to the National Plastics item.

Do you want to determine the serious question here of this taxpayer's rights on the basis of that kind of testimony? Do you want that to happen to this taxpayer,—to me, to you, to anyone? Would you do it to the person you most detested? I am hoping you don't, but if you do,—if you hate or detest anybody, would you do that to him? That is what he had done.

That, as Mr. Lord tells you, the last three lines, is their case. Knock away the prop, any one of those six (indicating), and the whole case tumbles in ashes at their feet. I suggest that you do it and I suggest that you as jurors individually and collectively rise up in your might, in your power as jurors, and declare, "Government, this you shall not do—to him, to me, to anyone. This I shall not lend myself to. This I shall not as an officer of this Court lend my power to."

What do you think of the temerity of it? They are only concerned with the unreported income in the last three years, and yet he tells you $73,000 in '43, and $78,000 in

'44. Which rope does he want you to use? Which gun is he pointing at who? What is the purpose of the figures before 1945? How stupid, my friends, do you believe the taxpayer to be? How stupid do you believe any person would be,—you would be, or you would be,—if you knew back in 1947 you were being investigated, a man of wealth, a man of responsibility, as to what they say the chart discloses and demonstrates? And they want you to believe he is that stupid.

Fairness, frankness—Weinstock—why don't we call him? Mr. Weinstock took the stand and almost before he opened his mouth, "Didn't you say so-and-so and such-and-such?" They never asked Mr. Weinstock one question that they should have asked, in fairnes, because it developed from Mr. McKusick's testimony that three weeks before the day of his testifying he knew from Mr. Weinstock that the taxpayer had $19,000 from a man named Herman Mitch, who the good Lord saw fit to call out of this world. When did Herman Mitch die,—of great importance?—much dust thrown to confuse you and mislead you from the main point of the drama. He knew three weeks before the trial opened that $19,000 had been paid to the taxpayer by Herman Mitch before his death, and not one word of testimony was elicited by counsel for the plaintiffs concerning it. Yet he amended the chart as to unsubstantial, unimportant matters, as he determined them, last Friday night.

There is so much to say I could talk for days, I am sure. I want you to understand this, however, that by permission of the Court there has been allowed the taxpayer the privilege of having two counsel speak for him. Mr. Graff will make an additional presentation to you. But I ask you to bear in mind from this very moment on, and bear it in mind seriously for the rest of the trial, that when Mr. Graff sits down, not one more word can be said in behalf of this taxpayer to you. That is our last opportunity to speak in his behalf. Subsequent thereto counsel for the plaintiff is permitted the final argument under the federal rules and then the Court charges you. Now, we cannot

make response to that argument. He can tell you, so to speak, anything he wants and may suggest by his statements that we should make answer. But we can't. And so if you think that there is something that I should have said,—if in your mind you find there is perhaps something you wanted Mr. Graff to say,—if, putting yourself in the position of the taxpayer or having him represent someone close and dear to you, there is something further that you would want from us, believe me, by friends, our failure to touch upon it is unintentional and only because of lack of time, or because of our considered opinion that other matters were more imoprtant and so we didn't. It is not deliberate.

There isn't one thing in this case. Exhibits 33, 70, 71, 224, 225, and Exhibit 214,—the creation and handiwork of the agent. The man who worked on this matter for five long years, 150 people interviewed,—he went to every bank and pulled out every cashier's check, every certified check, every money order. For five years he worked on him and then from the witness stand he said, "No, I have not been able to find or identify one source or item of income omitted from the returns except as to immaterial or small matters."

He exhausted every method,—direct income, receipts and disbursements, the testimony method, a combination of all, and then he pursued it further and further and decided that he would take the pattern that fit the cloth as he wanted the pattern to be. For five years he worked and he wasn't able to show graft. I suggest it may be a reasonable inference that he decided he had better show something and he didn't care how he showed what! For five years he pursued relentlessly his way into, through, around, about and under all of these things, and he hasn't yet pointed out to you one item of income that wasn't reported by the taxpayer in '45, '46, or '47.

Why do they drag in '41, '42 '43, and '44?—scenery. Jack Benny's violin was too small. It wouldn't cover up the whole brick wall, and they had to lower the fly in back. McKusick knew those things. He knew all of the answers. And then he brings it in and throws down five

years of work in the lap of Mr. Kleven and says "Tie up the knots." If when the knots are tied you don't weave a pattern of conviction, go out and get conclusion. Go to New York and ask the agent what he thought. Go to a report that nobody will see, and read it and interpret it. Listen to the witnesses in the court room and you decide what they say. Reject what you don't want. Accept what you do want.

Could it be that this is a case of agents engaged in law enforcement, so to speak, who prefer to remember only what is harmful, as they consider harm established, and not prefer but insist upon not remembering what is helpful,—insist upon not remembering what is beneficial?

Don't be misled. The government must prove its case. The taxpayer need not prove his innocence. You are not here, as the Court takes judicial notice, to collect taxes for the government. This is not that kind of a proceeding. There are other tribunals to determine what taxes he owes and how they shall be collected. He shall meet that there that day, not here now.

THE COURT: The jury may retire for a brief recess.

(Whereupon, at 11:30 o'clock a brief recess was taken.)

The COURT: Proceed, counsel.

ARGUMENT

by Mr. Graff

Mr. GRAFF: If the Court please, and gentlemen of the jury: I am very happy to have the privilege of talking to you about the events and the things that have transpired here during the last two weeks. I can only be commendatory of the interest that you have manifested throughout the trial and I see from that interest that you are all inspired with a firm desire to do justice by Tom Banks and to acquit your consciences in such a manner that the experience here will have been a most pleasant one, a most interesting one, and an instructive one.

The charge in this case is as follows: Tom Banks is

charged with having wilfully and knowingly attempted to evade and defeat a substantial portion of the tax which was owing by him for the calendar years 1945, 1946, and 1947. I make that statement because counsel for the government said that the case concerned an understatement of income by Tom Banks. The issue and the only issue is whether Tom Banks wilfully and knowingly attempted to evade and defeat a substantial portion of the tax that was owing for those three years, and if the evidence which is adduced here does not satisfy your minds beyond a reasonable certainty of the truth of that allegation, you have no other duty but to acquit Tom Banks and to acquit him promptly.

Let me ponder the charge which has been made and let us examine the evidence in the light of the charge and see what the government has adduced to sustain it. Have in mind that the charge says that Tom Banks wilfully and knowingly attempted to evade and defeat. What evidence has there been adduced from this witness chair about Tom Banks' wilfullnes and his knowingness? Search your minds and let's see what that testimony has been to date.

My notes reveal a fellow by the name of Jeff Halvorson, from near Grand Marais, testified that he made a loan from Tom Banks in the sum of $1,400, and Jeff Halvorson testified that he had an arrangement with Tom Banks to pay that loan back at the rate of $25 per month, but both Jeff Halvorson and his wife became ill. Tom Banks, according to Halvorson's testimony, said, "Well, pay it when you can." There is one item about Tom Banks that has come out in this testimony.

Do you remember when the real estate man was on the stand and he was telling you about the real estate transaction which he had handled? The real estate man was Philip Brancheau. Philip Brancheau told you—and, mind you, he was a witness for the government—that some land was being purchased from a widow woman who had some boys who did not want to farm, and the land was sold, I think, for a consideration of $8,500 and the assumption of a mortgage against that land, and Philip Brancheau testi-

fied when Tom Banks found out that it was a widow woman, he told Philip Brancheau, "Don't charge that widow woman a commission for selling that land. I will pay you the commission."

That is the kind of testimony that we have had about the kind of an individual that Tom Banks is. Now, they talk about Tom Banks wilfully and knowingly evading the tax. Where did he have his assets? He had a substantial portion of his assets invested in real estate, in rural Hennepin County. All those deeds and abstracts are on file. If he was attempting to fool somebody, he wouldn't be putting his money into real estate where everybody could very easily find it. He also had certain transactions with stock-brokers, and all of those transactions were revealed by records which were produced here in court. He didn't try to fool anybody about what he had or where it was.

And when the government, as a result of that meeting down in Mr. Stone's office on August 22, 1950, decided that they wanted to get the answers to certain questions, Mr. McKusick drafted the twenty-eight questions which are now embodied in Exhibit No. 70, and those questions were submitted to Mr. O'Gordon, and Mr. O'Gordon came here and testified that he had seen Tom Banks and he had seen Mr. Weinstock and he had gotten the answers and later gave the answers to Mr. McKusick, and if you will examine Exhibit 71, you will note that those answers were given to Mr. McKusick on February 1, 1951. Look at those questions. If Tom Banks wanted to fool somebody, do you suppose that he would furnish voluntarily to the government answers to a series of questions that they wanted from him? If there is something that you can derive of the kind and the character of a man he is, you can find it in those transactions.

They asked him for the information and he gave it to them as best he could. And wasn't it interesting to find out when we get to the court room that these questions were a little bit more sinister than we were first led to believe? As Mr. McKusick put it so definitely, it was the "last little grain" that he was lacking. He knew the answers to most

questions, but it was that last little grain that he wanted. And the answers were submitted to him and they have now been embodied on the chart before you. Nobody attempted to hide anything.

Now, counsel for the government has alluded to the fact that the questions pertaining to cash were not in there and were not answered on that series of questions. That is correct. What did the government do when it did not get the answer to those questions? Mind you now, this is the strong arm of the investigatorial branch of the government. It is seeking information and it has the time and the funds and the occasion to make this investigation. Did you hear one word from this witness stand what the government did after it got the answers to those questions on February 1, 1951 about getting the answer as to that cash?

I heard not one single solitary word. If the government wanted the answer to those questions, why wouldn't they pursue it when the questions were not answered as to the cash? I can only suggest the reason for it. I cannot look into their mind and analyze their conscience, but I know this, that if I want to find out something, I will exert every possible effort to find it out. After they got the answers to these questions, according to their testimony here, they did not do one, single, solitary thing about it. Why? I will tell you why I think so,—because it served their own purpose not to have the information. If it was important for them to get it, why didn't they dispatch these legions of investigators out to get this information?

And wasn't it interesting after Mr. Kleven was on the witness stand and we had this chart produced here, that we found under the cash items that they had not credited Tom Banks with any cash except a few dollars which were in bank accounts. They made no effort to find it out. It served no purpose for them, and they had every reason to exclude it from you. Do you remember Mr. McKusick's testimony when he told you the different methods as to how he decided to attack this case? You remember he had the bank deposits method and he said he abandoned that because it was not equitable to the taxpayer and to the

government, and then he talked about the receipts and disbursements methods, he talked about the testimonial method, and then he finally decided that the net worth method was the method that he would use. Have in mind that he made that determination after this corps of investigators descended upon the City of Minneapolis across the river, and remember his testimony, they went to the banks and they examined every single check, every single bank draft, face and back, and they correlated it all into a pool.

I thought the days of the "witch-hunt" had passed away a long time ago. That is what this was. It was a witch-hunt and it was characterized here as an investigation to determine whether there were any graft payments to members of the city government in Minneapolis, and then after starting on that investigation on April 2, 1946, it continues and, according to Mr. McKusick's testimony, it continued until the latter part of 1947, when the drive became most intensive, and then it continued in '47, '48, '49, and you remember, I asked him,—When did he complete his investigation? And after we fenced for a while, he finally said he completed his investigation in the fall of 1951, if I regarded August as being in the fall.

Mr. Kleven got into the case in 1951, and between Mr. Kleven and Mr. McKusick, the information was correlated. Now, let me come back to the questions and answers just a moment, Exhibit 70. You will recall on Exhibit 70 was the question concerning the $25,000 check of National Plastics. And on the questions and answers there was disclosed the fact that this taxpayer had a one-half interest in that check of National Plastics and I direct your attention to Exhibit 221,—May I have it, please, Mr. Clerk?

The CLERK: I have it right here, sir.

Mr. GRAFF: (Continuing) Exhibit 221, if you will recall, was Mr. McKusick's chart to determine the investment in McCarthy's. And if you will look at the first column of figures, he has down there the investment of $25,000 in McCarthy's under the name of Rita Banks or Tom Banks. Exhibit 221 was brought into this court room during Mr.

McKusick's testimony. Those answers to those questions were given to Mr. McKusick under date of February 1, 1951. This is May, 1952,—one year and several months later. And they either were so careless—or they had an ulterior motive—that they couldn't even take this exhibit and correct it in accordance with answers which had been given to them.

They had the information ever since February 1, 1951 and it was given to them voluntarily. And if you will look at Exhibit 221, you will find the name of "J. J. Keegan," and you will recall when Mr. McKusick was on the stand, I asked him to show me in the general ledger of McCarthy's where the name of J. J. Keegan was, and he couldn't find it. When he came back the next day, he said it was a mistake. I will give him credit for admitting that he made a mistake, but is that the sort of work that you people are to rely upon? Is that the sort of carelessness upon which they want you people to try an individual accused of a very serious offense? Is that what they want to base it on?

Now, let's talk about Exhibit 33. Exhibit 33 was an affidavit given by Tom Banks under date of July 2, 1937, and it was given as part of a compromise offer to settle an alcohol tax liability. That is the testimony in this case. I called attention in this Exhibit to the fact that while it was dated July 2, 1937, the attachment to it refers to an affidavit of Tom Banks under date of April 8, 1937,—and I forget who the witness was on the stand,—but he said, "Well, he hadn't noticed it before but that referred to some earlier proposals which had been made to settle that particular matter.

Now, there is nothing wrong morally or legally in submitting a compromise offer for an obligation which the government claims it is due. That is sanctioned by law. He had a perfect right to submit an offer in compromise and he had a perfect right to submit an affidavit in connection with it. And it is rather interesting to now find that an affidavit given by this taxpayer in 1937, nearly 15 years ago—it will be 15 years in July—has stood the test of time.

It was considered so reliable by Mr. Kleven that he said that he used it in connection with the preparation of Exhibit 224.

Now, counsel has made reference to it, that the taxpayer said he was insolvent. Now, I want to read you that portion of it,—and let me say to you jurors, you take these exhibits with you when you go to the jury room. We have no desire to conceal any of the facts from you, or hide them from you. We are not afraid of the facts. We want you to take the facts, because we know that if you will take the facts in this case, there will be only one verdict that you can return and that will be a verdict of acquittal for Tom Banks. So please do not be afraid of the facts in this case.

I will read that portion. "It is my opinion that I am actually insolvent at the present time." He recites in there properties which he owns. The government, however, when they make up their Exhibit 224, say, "No, no,—actually insolvent doesn't work. We are going to start him off with a net worth of $18,000." We will stand on the exhibit, but they say $18,000, and when they say $18,000, they haven't made any effort or haven't any desire to find out the amount of cash, because it will upset their calculation.

Something has been said about taxes. I suppose that we all have something in common about taxes. I don't know of anyone who enjoys paying taxes. I don't know anyone who is exempt from paying taxes, either directly or indirectly. Now, this case, as I told you, was solely to determine whether Tom Banks attempted to evade or defeat certain taxes in certain years. This case is not for the collection of taxes. There are other courts and other forums in which, if a person is civilly responsible for any tax, the government can collect it, and where the issues pertaining to that civil liability can be determined. What is done here has no effect whatsoever upon the determination of the civil tax when that question is presented in the proper forum. So please do not be misled by the fact that what you may do here will determine the amount of tax that a

man has to pay, or doesn't have to pay. We are not concerned with that question.

Now, Exhibit 215 is the Len Welsh check, concerning which we have talked a good deal. It has been assumed by the government, but there has been no proof to show that the Len Welsh check, Exhibit 215, ever went to the Daily Mail. They have it on their chart as having gone to the Daily Mail, but they have adduced no proof concerning it. If you would examine the endorsement on the reverse side, it is not the endorsement of the Daily Mail. It is the personal endorsement of Len Welsh.

Why wouldn't they produce some evidence to tie it to the Daily Mail if such was the fact? They either were unable to do so, or they didn't care about doing it, and if they were unable to do so, why didn't they come in here and tell us honestly what the fact was? I suggest that you examine the check, Exhibit 215, very carefully, and there isn't anything that indicates that the Daily Mail got that check. Mr. Kleven assumed that this check had not been repaid. You remember, I asked him whether it was a loan, or how could he tell? He assumed that it had not been repaid on the basis of Mr. Weinstock's testimony, and I submit there was nothing in that testimony which would justify him in that conclusion. For all he knew, it might have been a gift.

It is our position that the evidence in this case relied upon by the government is necessarily of a circumstantial nature. I am sure that the Court will instruct you how to handle evidence of that kind, but let me point out to you that evidence of a circumstantial nature, to warrant a conviction, must exclude every other reasonable hypothesis, including the hypothesis of innocence.

The indictment in this case was returned on January 14, 1951. You will recall that counsel for the government read that indictment to you at the beginning of the case. The total of the taxes which they claimed were due and owing as of that time in the indictment was the sum of some odd $42,000.

Mr. LANDRUM: Just a moment, if the Court please. That

is objected to. That is improper argument. It is not necessary for the government to prove the exact amount set forth in the indictment. Any substantial evasion is sufficient.

The COURT: Well, that is correct.

Mr. GRAFF: I don't think I have said anything improper, Your Honor.

Mr. LANDRUM: He said $42,000.

The COURT: Very well; proceed. Stay within the record, —what the evidence shows.

Mr. GRAFF: The indictment was read to you and the figures were read to you. The total of the figures which were read to you I submit was a figure around $42,000. On Exhibit 228, if you please, the total of the taxes now claimed by the government as a result of a few weeks of trial has been reduced to some $32,000. In other words, we lost some $10,000 on the way. Maybe we should have continued in Court here for a while and we would have had some money due and owing to us!

But I cite it only to show that Mr. Kleven had made up his chart more than a year ago. The indictment was returned on January 14th and it has a certain amount, and after two weeks of trial, the amount is dropped some $10,000. What kind of business is that? Is that the kind of work and is that the kind of accuracy that we have a right to expect from people that are working and dealing with these figures, or have they been so careless in their work and yet zealous in their effort to do something to this taxpayer?

Do you recall the testimony of Mr. Kleven when he was on the stand, and I was asking him concerning the identity of exhibits which disclosed that there was no cash,—where he got the figures for cash for Tom Banks as of the beginning of the period? Do you recall his testimony? Do you remember that Mr. Kleven testified that when he made up chart 224 he made it on the basis of all the exhibits in court and the testimony, and then he mentioned all of the exhibits as we were going through. Later on in his testimony it was developed that he did not make it up only on the basis

of the testimony and on the exhibits in evidence, but he made it up on all the other things that Mr. Hoffman has already called attention to.

I would like to call your attention to that portion of the testimony and let's see whether the representatives of the government have been fair with you people. If you will pardon me just a moment, I will refer to the point in the record. For the benefit of counsel, I have volume——

Mr. Landrum: I don't care to follow it.

Mr. Graff: For the record, it is volume VII, page 872, examination conducted by Mr. Lord.

(Reading)

"Q. (By Mr. Lord) Mr. Kleven, have you been in this court room during all the trial of this case?

"A. Yes, I have.

"Q. Have you heard all of the oral testimony as to the fact?

"A. Yes, I have.

"Q. And have you had occasion to examine the various exhibits introduced into evidence in this case?

"A. Yes.

"Q. From the exhibits in this case and from the oral testimony adduced here in this court room as to facts, are you able to make an analysis and a summary under the net worth method to show the income of this defendant from the years 1936, 1941, '42, '43, '44, '45, '46, and '47?

"A. Yes.

"Q. Have you reduced such a summary to chart form?

"A. Yes, we have.

"Q. Mr. Kleven, showing you Government's Exhibit 224, can you tell me what that is?

"A. That is a typewritten copy of the figures that I prepared of the net worth summary.

"Q. Was that prepared more or less under your general supervision?

"A. Yes, it was."

Those were the answers of Mr. Kleven under examination by government counsel. I am referring to the record, Volume 8, page 987.

"Q. And after you got into the case and after you had an opportunity of going over all the material that Mr. McKusick had assembled, and made the independent investigation that he made, did you then start putting your figures together, so to speak?

"A. Yes, about that time I did.

"Q. And about when was it that you started, so to speak, to put your figures together?

"A. Oh, I could not give you any exact date now.

"Q. Approximately?

"A. It would be in the spring of 1951.

"Q. On your direct examination you indicated that you worked on this matter from January, 1951, until you completed your report in May of 1951?

"A. Correct.

"Q. Would you say that that is correct?

"A. That is correct.

"Q. And then you did not further work on this case until you were called over to the United States Attorney's office in January of 1952?

"A. That is correct.

"Q. And that since January of 1952, you have been working more or less steadily on this case?

"A. That is correct."

I then asked the clerk for Exhibit 225.

"Q. Now, Mr. Kleven, when you prepared Exhibit 224 and 225, did you include therein for the period December 31, 1936, to and including December 31, 1947, all of the property of the taxpayer?

"A. Are you asking about the entire exhibit or just referring to the first page?

"Q. The entire exhibit, for the entire period.

"A. To the best of my knowledge, all the property that we could find.

"Q. I am asking you, Mr. Kleven,—did you include it all?

"A. Yes, to the best of my knowledge, I put in everything that I could find.

"Q. Now, Mr. Kleven, did you make any search or investigation to find any other property owned by the tax-

payer during the period December 31, 1936 to December 31, 1947?

"Q. Will you read that question, please?

(The question was read.)

"A. Didn't I just answer that? Wasn't that the question you asked me before?

"Q. No.

"A. I do not quite understand that question."

Then the question was read by the reporter. He started making an answer—

"A. Yes, we made a search——

"Q. (Interposing) No, did you make any search to find any other property belonging to this taxpayer for the period December 31, 1936 to the period December 31, 1947?

"A. Yes, I did.

"Q. Did you find any?

"A. No,—I found some different valuations.

"Q. Did you find any other property?

"A. No, I found no other property.

"Q. Now, Mr. Kleven, did you personally find any other assets or liabilities of the taxpayer other than disclosed by Exhibits 224 and 225?

"A. I would say that we found some minor negligible items that are not included.

"Q. Not "we",—I am asking you personally, Mr. Kleven.

"A. Well, I have seen a couple of items,——

"Q. Did you personally find any?

"A. You mean my own personal investigation?

"Q. You, Mr. Kleven, did you personally find any?"—notice how cooperative this witness is in trying to furnish us the information. He worked on this thing,—started in January of 1951. He completed his report in May of '51. He started again in January, 1951, and has been working on it continuously. Let me skip and come to the questions concerning the cash.

"Q. Now, Mr. Kleven, on Exhibit 224 you show what figure of cash in the possession of the taxpayer as of December 31, 1936?

"A. $159.15.

"Q. What proportion of the $159.15 was in the possession of Reta Banks as of December 31, 1936?

"A. That was all in the name of Reta Banks, in her bank account.

"Q. I see. And the amount of that again was how much? I am sorry, I could not get the amount.

"A. $159.15."

Now we come to the series of questions that I am trying to direct your attention to, this witness who is trying to give us all the information.

"Q. And how much cash did the taxpayer Tom Banks have in his possession as of December 31, 1946—and I would like to have you refer me to the exhibit upon which that answer is contained.

"A. He had none.

"Q. Now, would you give me the exhibit reference number? What is the exhibit reference number that proves that fact?

"A. Well, I could not count the cash he had in his pocket twelve years ago.

"Q. Just a moment, Mr. Kleven. I asked you to give us, if you please, the exhibit number that is in evidence in this case that proves the statement that you have made.

"A. Exhibit No. 33, the affidavit, reported no cash.

"Q. I hand you, Mr. Kleven, Government's Exhibit 33, which has been identified as an affidavit dated July 2, 1937, and I would like to have you point out to this Court and jury what is contained in that affidavit which shows that the taxpayer, Tom Banks, had no cash on December 31, 1936.

"A. The total of the assets listed in this affidavit are about $13,000.00. We have set them up here at about $18,000.00"—I was asking him where.

"Q. Would you please point out to me in Government's Exhibit 33, the statement or statements which show that Tom Banks had no cash on December 31, 1936?

"A. There is no statement, but I can work it back by analysis.

"Q. There is no statement in that exhibit?

"A. No, not as of December 31, '36.

"Q. I see. And there is no exhibit in evidence in this case, is there, Mr. Kleven, to which you can point which proves that Tom Banks had no cash on December 31, 1936?

"A. Well, you can say that as far as personal cash for every single year on the whole balance sheet.

"Q. Well, just take '36 first.

"A. Yes.

"Q. So there is no exhibit in evidence in this court which shows how much cash Tom Banks had as of December 31, 1936? That is correct, is it not?

"A. That is correct.

"Q. Is there any testimony in this case that you have heard that establishes the amount of cash that Tom Banks had in his possession on December 31, 1936?

"A. I do not recall any."—this was the government witness who said he made up this chart on the basis of exhibits and testimony in this case, and it took a series of questions to finally extract the truth out of him that there wasn't any exhibit in this case which showed that amount of cash. It took all those questions. Why?

The only reason I could suggest is that somebody had a sinister motive in attempting to keep from you, this jury, the facts in this particular case. And when you retire to your jury room, and when you consider what the evidence is and what the facts truly are, I think that you will have a rule of law which will assist you that if any witness in this case has testified falsely, you will be privileged to exclude his testimony except to the extent that it is corroborated by other credible testimony.

You are men of experience from all walks of life. And when you go into that jury room, you are not going to be asked to discard your good common sense that you acquire in the ordinary affairs of life in whatever work you happen to be engaged in. You have got to use it in your jobs, whatever they may be. Don't discard it when you go into the jury room. You are the barrier, if you please, between the oppression of a citizen and the rights which are due a citi-

zen. This case, started with an investigation about so-called graft in April of 1946, apparently had to have something to account for all the time and money spent on it. This I think it is.

This I think it is because they have deliberately refused to follow certain courses of inquiry which if they had wanted to get the facts, they would have followed out. The testimony of Mr. Kleven here demonstrated that he had only one purpose and one purpose only in mind—to try to make Exhibit 225 stick—and, as Mr. Hoffman told you, we are not afraid of that exhibit or any other exhibit in this case, and we are not afraid of any fact in this case.

Let me characterize Exhibit 225 for you. Exhibit 225 to me is a monument. It is a monument to the greed and selfishness of certain individuals. It is a monument of confusion, and if you do not believe that there was some confusion attendant with this matter,—you were here, you had an opportunity of observing it. These were people who had dealt with this case ever since April 2, 1946.

It is a monument. It is a monument, if you please, to governmental stupidity. And we, as citizens, have the right and the privilege, and it is one that we will never surrender —and I don't want you ever to surrender it—to criticize our government whenever we think that criticism is justified. And I say we are not afraid of Exhibit 225. We think it is a monument. We think it is a monument of stupidity. We think it is a monument of selfishness, of greed.

When you gentlemen retire to your jury room, you will have some important things to consider. I know that you will treat these matters as conscientiously as you would want them considered if Tom Banks sat in your chair and you sat in Tom's chair. Under the oath you have been given, you are to determine this matter in accordance with the testimony and the evidence which has been adduced in this court room. Under the law, you are the exclusive and the sole judges of the facts, and there is no court in this country, and there is no tribunal in this country, and there is no bureau in this country—not even the Supreme Court

of the United States—that can tell this jury what the facts are in this case. No one can take that responsibility from you, and no one can encroach upon it. That is your responsibility, and don't surrender it lightly to anyone. You are the ones who are to determine the facts,—not a governmental agent who comes and sits here and says, "I conferred with my associates," or, "I examined a bunch of old wives' tales,"—and that is what I think the facts are.

And remember, that with respect to the exercise of your judgment pertaining to those facts, you have to exercise your own initial judgment. That is your oath as a juror, and I want you to cling to that and let no one take it away, and stand steadfast by the conviction you have formed as a result of the testimony and the exhibts in this case. Stand steadfast. Be true to your oath. Treat your fellow citizen the way you would want to be treated if the tables were turned.

Finally, may I say to you gentlemen, it has been a pleasure to have been with you, and I am sure that when you get to your jury room, you will see it the way we have seen it unfold here. Give your answer to the monument. Give your answer to selfishness and greediness. Give your answer to ambition. And give your answer to the facts in this case, that Tom Banks has not done what the government wants you to believe that he has done. With that job having been done and your verdict having been returned into court, you will, of course, return to your private lives and I know that as you return you will be happier for the experience that you have had and the opportunity that has come to you to set something right which you know and must know in your hearts has been wrong.

OPINION ON MOTION TO MODIFY SENTENCE

United States v. *Banks.*

No. 7446

UNITED STATES DISTRICT COURT, D. MINNESOTA, THIRD DIVISION.—Oct. 20, 1952

BELL, District Judge.

Thomas W. Banks, the above named defendant, was indicted for income tax evasion for the years 1945, 1946, and 1947 in violation of 26 U.S.C. § 145(b). The total tax evasion was alleged to have amounted to more than $50,000. He was tried before a jury in May, 1952, and found guilty on all three counts. On June 23, 1952, a general sentence of three years in the penitentiary and a fine of $10,000 was imposed.

A motion for a new trial was presented and overruled. An appeal was taken to the United States Court of Appeals for the Eighth Circuit, which was filed on July 9, 1952 and which is still pending.

The case now is before the court on a motion for a modification of the sentence for suspension of the sentence and the application of probation under the Federal Probation Act, 18 U.S.C. § 3651, which provides:

> "Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States, except in the District of Columbia, when satisfied that the ends of justice and best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best."

[1] The Probation Act conferred on District Courts of the United States the power, when satisfied that the ends of

justice, and the best interests of the public as well as of the defendant, would be subserved by suspending the imposition or execution of sentence. The chief objective of the act is to allow a period for supervision by an officer of the court to aid in the rehabilitation of a penitent offender and to offer an opportunity for reformation which actual service of the suspended sentence might make less probable. The provisions of the act generally are applied by the courts in dealing with first offenders, those who have made a mistake for the first time but whose character and background indicate a possibility of future good conduct. In dealing with hardened criminals, violators who have acquired a criminal record, persons who violate the law for profit, the smart offenders who are willing to risk detection, the courts usually have denied probation under the act. Obviously Congress did not intend for the Probation Act to be used by the courts to suspend the imposition or execution of sentence and eliminate punishment of persons deliberately engaged in violating the law. Especially is this true where persons repeatedly have been convicted of violations of the law and have shown by their attitude and conduct that the court cannot expect them to benefit by supervision under the act.

The application of probation in a deserving case is a humanitarian act of the court that invites the approbation of society, while its use in an unworthy case breeds contempt for the law. Justice properly may be tempered with leniency if sound judgment is used in selected the subjects of the court's bounty, but the criminal class must understand that when laws are wilfully and intentionally violated punishment will be certain, fearless and adequate. Enforcement of the law is essential to good government and the most effective way to prevent crime is to punish criminals.

[2, 3] The law imposes no requirement on the court to extend probation. It is a favor bestowed by the court on persons deemed worthy of the court's supervision. Probation cannot be demanded as a right, rather it may be conferred only as a privilege. Flexibility in administration is essential to an extensive degree. Each case must be ana-

lyzed to give a careful, comprehensive consideration so as to evaluate the character, qualities and possibilities of each offender, and this requires an exercise of a broad discretion.

The foregoing principles have been sustained by the courts in many decisions showing a remarkable accord in the interpretation and the applicability of the act. *United States* v. *Murray*, 275 U.S. 347, 48 S. Ct. 146, 72 L. Ed. 309; *Roberts* v. *United States*, 320 U.S. 264, 64 S. Ct. 113, 88 L. Ed. 41; *United States* v. *Johnson*, D.C., 56 F. 2d 658; *United States* v. *Nix*, D.C., 8 F. 2d 759; *United States* v. *Durkin* D.C., 63 F. Supp. 570.

Mr. Chief Justice Taft prescribes the scope of the Probation Act in *United States* v. *Murray, supra*, as follows:

> "The great desideratum was the giving to young and new violators of law a chance to reform and to escape the contaminating influence of association with hardened or veteran criminals in the beginning of the imprisonment. Experience had shown that there was a real locus poenitentiae between the conviction and certainty of punishment, on the one hand, and the actual imprisonment and public disgrace of incarceration and evil association, on the other. If the case was a proper one, great good could be done in stopping punishment by putting the new criminal on probation. The avoidance of imprisonment at time of sentence was therefore the period to which the advocates of a Probation Act always directed their urgency. Probation was not sought to shorten the term. Probation is the attempted saving of a man who has taken one wrong step, and whom the judge thinks to be a brand who can be plucked from the burning at the time of the imposition of the sentence. * * *"

Mr. Chief Justice Black in *Roberts* v. *United States, supra*, said:

> "In no way does it impair the Act's usefulness as an instrument to accomplish the basic purpose of pro-

bation, namely to provide an individualized program offering a young or unhardened offender an opportunity to rehabilitate himself without institutional confinement under the tutelage of a probation official and under the continuing power of the court to impose institutional punishment for his original offense in the event that he abuse this opportunity. To accomplish this basic purpose Congress vested wide discretion in the courts. See *Burns* v. *United States*, 287 U.S. 216, 53 S. Ct. 154, 77 L. Ed. 266. Thus Congress conferred upon the courts the power to decide in each case whether to impose a definite term of imprisonment in advance of probation or to defer the imposition of sentence, the alternative to be adopted to depend upon the character and circumstances of the individual offender."

In *United States* v. *Johnson*, *supra*, the court said:

"The probation law is founded upon humanitarian considerations, and is designed to prevent crime and restore to the ranks of upright citizens many, who through ignorance, youth, inexperience, or weakness of will, have been guilty of infractions of the law. From its very nature, however, this law can be easily abused if courts and officials concerned in its administration allow their sympathies alone to dictate their actions. Probation should not be so commonly granted that fear of punishment loses its preventive force. A tendency in this direction has already been observed, and has produced a natural reaction, so that we find that the repeal of this beneficent law is being advocated by students of criminology. If that result is to be averted, firmness and good judgment must not be subordinated to the quality of mercy in its administration. I think the true scope of the law is found in dealing with young and first offenders, where the possibility is plainly indicated that they may, in spite of a single departure from rectitude, be retained in the ranks of their law-

abiding fellow citizens. As Judge Bourquin has so well pointed out in *United States* v. *Meagher*, D.C., 36 F. 2d 824, 825, in behalf of these thoughtless young, probation may serve a useful purpose, but it should not be extended to the nature where the crime is premeditated and where committed for profit. In such cases defendants take the chances, and, when detected and convicted, they should take the consequences. First offender too often means first detected. 'To convicts treatment appropriate to their offenses * * * will go far to solve the problem of crime, father than ought else save inculcation of good morals from youth to age.'

"Probation is intended as a substitute for imprisonment in certain cases to effect a reform and avoid the contamination of time in prison, neither of which would be effective here. It is obvious that to grant probation in this case would be to depart from the purpose of the law generally and of the probation law in particular. * * *"

In *United States* v. *Nix*, *supra*, the court in commenting on the Probation Act, said:

"In extreme cases, and in cases of more or less minor offenses, probation is being granted under supervision of special volunteer probation officers, appointed for each particular case. However, the placing upon probation generally requires an extensive investigation to be made by competent officers of the government. The court should, through its own official channels, be able to secure detailed written data covering the circumstances of the offenses, the previous record, character, family history, home conditions, mental and physical conditions, habits, associations, and other important facts regarding the accused. In many cases medical certificates will be required. The law clearly contemplates, and the situation necessarily requires, that when probation is granted there must be close supervision of the probationer, and systematic reports submitted to the court.

"No hard and fast rule can be laid down as to the type of offenders who should be considered for probation. I have heretofore in several cases expressed my general views on this subject. It is my view that the Congress, in passing the Probation Law, had in mind particularly juvenile offenders, youthful offenders, first offenders and offenders whose release on probation will not endanger the public, and where there is reason to believe that the individual will make a serious effort to overcome the abnormalities and difficulties which brought him into court. In general, the offense contemplated, as I view it, would be largely those of a more or less minor character, or those induced by youth, inexperience, mental abnormalties, physical abnormalities, ignorance, poverty, superstition, jealousies, or heat of passion. Conversely, I do not think that the law, except in very rare cases, should have application to hardened, habitual criminals, to those who need to be restrained as a matter of protection to themselves and to society, or to those of mature years, of fair education, of broad experience, who have committed some very deliberate offense. A survey of the probation systems of the several states supports this view."

In *United States* v. *Durkin, supra,* the court said:

"Since the passage of the Federal Probation Act, 18 U.S.C.A. § 724 et seq., there has been a marked tendency on the part of some to treat this Act as one conferring upon the courts similar power to that conferred upon the President of the United States under Section 2, Article II of the Constitution, viz: the power of the Chief Executive to pardon and reprieve for offenses committed against the United States.

"That this is a misconception of the true purpose of the Act, and a clear abuse of judicial power, is apparent to all who properly understand the true theory upon

which the three coordinated branches of our government are founded.

"It will be admitted by all familiar with the background of probation legislation, and the authorities construing it, that it was intended to provide 'an individualized program offering a young or unhardened offender an opportunity to rehabilitate himself without institutional confinement under the tutelage of a probation official', 'a means of restoring offenders who are good social risks to society,' 'to give young and new violators of law a chance to reform and escape the contaminating influence of association with hardened or veteran criminals in the beginning of the imprisonment'.

"A study of the various Probation Acts in operation throughout the United States, including our own State, will reveal this fact. The entire history and background surrounding probation laws demonstrates clearly they were never intended to be used to defeat the ends of justice by extending their use to the hardened criminal class.

"One who has had some experience in the enforcement of the criminal laws knows there are certain persons who coldly and deliberately choose a life of crime —men and women who have decided to be enemies of organized society by making their living through lawbreaking. These persons expect the law to catch up with them and when apprehended and prosecuted for their crimes, cunningly plan to do everything in their power to defeat the ends of justice.

"There have been instances where, after putting their government to the expense of apprehension and conviction, such persons have been placed upon probation and in each of such instances the ends of justice have been defeated.

"It is a regrettable fact that courts sometimes commit innocent error in being parties to such miscarriages of justice, and, either by being unduly imposed upon or through unwarranted sympathy, allow persons to

escape the punishment they deserve. This is unfortunate. However, these are some of the things the hardened criminal considers in computing his percentage of successfully escaping the law.

"What then did the Congress of the United States mean when it provided that only when the ends of justice and the public good are subserved shall offenders against the criminal laws of the United States be placed on probation?

"It is true the Congress did not see fit, like many of the States, to incorporate specific language into the Probation Act placing a limitation on the courts as to the class of persons permitted to be released upon probation, but common sense, as well as a respect for the power granted solely to the Executive Branch of the Government, tells us the courts should not, by extending its privileges to the hardened criminal, use the Probation Act as a substitute for Executive Clemency or Presidential Pardon.

"The courts by such use of the Probation Act usurp the power of the Executive and the administration of justice comes in for deserved public criticism. Following this comes disrespect for the courts by the public generally and the hardened criminal is encouraged to continue his work of crime.

"In providing for a system of probation and authorizing the suspension of final judgment and the imposition of sentence upon persons found guilty of crimes and offenses, certain States have excluded such persons from the benefits of such legislation as were previously convicted of a crime greater than a misdemeanor. In all of the these acts will be found language which requires the court before granting probation to be satisfied that there is reasonable ground to believe the best interests of society will be subserved even though the applicant be a first offender.

"The power to place on probation, lodged in the Judicial Branch of the Government in deserving cases, is not an act of grace intended to exempt the individual

on whom it is bestowed from the punishment the law inflicts for a crime he has committed. If this were true the Probation Act would have the same legal effect, and certainly the same practical effect, as pardon.

"The power of the court to grant probation to a convict after his conviction, or after a plea of guilty, by suspending the imposition or execution of sentence, is founded upon considerations of the public good and is to be exercised on the ground that the public welfare, which is the legitimate object of all punishment, will be as well promoted by a suspension as by a execution of the sentence. Contrary to the dramatically expressed opinion of applicant's counsel in his appeal to the sympathy of the Court it is not a personal favor nor a private act of grace from the court who happens to possess such power, and is never to take the place of clemency by the President under the Constitution."

Certain very controlling facts in this case should be considered in the light of the above quotations:

The defendant in November, 1929, entered a plea of guilty to a charge of conspiracy to violate the National Prohibition Act, 27 U.S.C.A., and paid a fine of $2,500. In March, 1934, he entered a plea of guilty to a similar charge and paid a fine of $2,000. Both charges were felonies.

Subsequent to the prohibition era the defendant and his associates conducted many food serving and liquor dispensing places in Minneapolis and other cities. For a long period of time he has been interested in slot machines, coin-operated devices and gambling places. During the greater part of his active life the defendant has been engaged in business on an extensive scale and has owned property of large value. He is experienced in modern business affairs and methods. He has employed lawyers, accountants, and experts in taxation. His liquor licenses have not always been legal. He has failed to keep proper books and records of his transactions. The greater part of his business has been done with the use of money and without using banks or the usual methods by which business affairs customarily are transacted.

Reports of law violations and on the whole a corrupt situation in the city of Minneapolis lead to an investigation by the United States of the defendant's tax liability for the period 1921 to 1933. An additional tax liability was established and the taxes paid by the defendant in 1937. During the investigation the defendant refused to cooperate with the investigators, one of the reasons for the length of the time required for the work.

In the investigation leading to the indictment in this case proper books and records were not made available to the agents of the government. Again the agents were confronted with a lack of cooperation, and a long period of time was required to ascertain the facts. Indeed, the agents of the government and the court in the trial of the case could establish the defendant's tax liability only by the "net-worth method." However, the evidence was sufficient to sustain a finding of a tax evasion for the years 1945, 1946, and 1947 of more than $32,000.

The record in this case shows that the defendant owned an interest in the Casa Blanca Cafe in the city of Minneapolis wherein a man at a late hour in the night in 1945 was shot and killed. The defendant in this case was present when the shooting occurred. Later one Shetsky was indicted for the murder of the deceased, tried twice in the state courts for the crime, once convicted and sentenced to the penitentiary at Stillwater, Minnesota. During the first trial Shetsky left the courtroom, absconded and later was found in California, thereupon was returned to Minnesota, tried a second time and acquitted. When Shetsky absconded during the first trial of his case, his bond was forfeited and it was ascertained that the defendant Banks had contributed $5,000 of a $20,000 bond.

It has been urged that the defendant is a kindly, generous individual and has made contributions to friends, worthy organizations and persons in need. The tax evasions for the years 1945, 1946, and 1947 were quite sufficient to purchase a reputation for generosity.

The attention of the court has been directed to the fact that the defendant has not been convicted of a law violation

since 1934 and that if he ever possessed criminal inclinations he has reformed and is now entitled to the consideration of a first offender. Unfortunately, this is not conclusive proof that no violations have been committed during the intervening period.

The defendant came into court for the trial of this case represented by three able, experienced lawyers who vigorously represented him at every step of the trial. A jury carefully selected under the rules of court was placed in the custody of the United States Marshal throughout the trial, segregated from public contact and influence and all newspaper articles pertaining to the trial withdrawn from the jurors. The trial covered a period of two weeks and the rights of the defendant were fully protected at all times.

[4] The defendant is about sixty-four years of age, married and without children. He is intelligent, experienced in business and has been successful and prosperous in his affairs. Unfortunately, he has conducted his business at times in violation of the laws of the federal, state and local governments, and finally was brought to the bar of justice. The court in this case is forced to the conclusion that the defendant is not the type of person who would be influenced or who would profit by the supervision of a probation officer. To extend probation in this case would be an abuse of the court's power.

[5] The government in response to the motion has urged that under the decisions of the Supreme Court of the United States and the Federal Rules of Criminal Procedure, 18 U.S.C., this court has no jurisdiction to modify or in any way reduce the sentence during the pendency of an appeal. It has been held that during the pendency of an appeal from a sentence, the District Court is without jurisdiction to modify its judgment by resentencing of the defendant. *Berman* v. *United States*, 302 U. S. 211, 58 S. Ct. 164, 82 L. Ed. 204. However, counsel for defendant has stated that the appeal in this case would be dismissed in the event probation is granted. Consequently, the decision of this question in view of the foregoing need not be determined.

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[6] It has been further urged by the government that under the Federal Rules of Criminal Procedure the motion is untimely since sentence was imposed June 23, 1952, and the motion was presented September 10, 1952, and that more than sixty days have expired since the date of sentencing. This question likewise is moot in view of the decision of the court that this is not a proper case for probation. The motion is overruled.

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[fol. 3] And thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Eighth Circuit, viz.:

(Appearance of Counsel for Appellant.)
United States Court of Appeals
for the Eighth Circuit.

Thomas W. Banks, Appellant,
No. 14,648. vs.
United States of America.

The Clerk will enter our appearance as Counsel for the appellant.

JEROME HOFFMAN,
1220 Minnesota Building,
St. Paul 1, Minnesota.

RICHARD E. KYLE,
W-2162 First National Bank Building,
St. Paul 1, Minnesota.

JOHN W. GRAFF,
1220 Minnesota Building,
St. Paul 1, Minnesota.

HOFFMAN, DONAHUE & GRAFF,
1220 Minnesota Building,
ST. PAUL 1, MINNESOTA.

(Endorsed): Filed in U. S. Court of Appeals, Jul. 9, 1952.

[fol. 4] (Appearance of Counsel for Appellee.)

The Clerk will enter our appearances as Counsel for the Appellee.

H. BRIAN HOLLAND,
Assistant Attorney General.

ELLIS N. SLACK,

MEYER H. ROTHWACKS,

MURRAY L. SCHWARTZ,
Special Assistants to The Attorney General.

(Endorsed): Filed in U. S. Court of Appeals, Feb. 24, 1953.

(Order of Submission.)

September Term, 1952.

Friday, March 13, 1953.

This cause having been called for hearing in its regular order, argument was commenced by Mr. John W. Graff for appellant, continued by Mr. Murray L. Schwartz, Special Assistant to the Attorney General, for appellee, and concluded by Mr. John W. Graff for appellant.

Thereupon, this cause was submitted to the Court on the printed record of appellant, the supplement to printed record by appellee, and the briefs of counsel filed herein.

[fol. 5] Opinion.

United States Court of Appeals
For The Eighth Circuit.

No. 14,648.

Thomas W. Banks, Appellant,
vs.
United States of America, Appellee.

Appeal from the United States District Court for the District of Minnesota.

[May 27, 1953.]

John W. Graff (Jerome Hoffmann and Richard E. Kyle were with him on the brief) for Appellant.

Murray L. Schwartz, Special Assistant to the Attorney General (H. Brian Holland, Assistant Attorney Gen-

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eral, Ellis N. Slack and Meyer H. Rothwacks, Special Assistants to the Attorney General, and Philip Neville, United States Attorney, were with him on the brief) for Appellee.

Before GARDNER, Chief Judge, and WOODROUGH and THOMAS, Circuit Judges.

THOMAS, Circuit Judge.

Thomas W. Banks was indicted, tried and convicted on three counts of an indictment which charged that he had willfully and knowingly attempted to evade his income taxes for the years 1945, 1946, and 1947, in violation of § 145(b) of the Internal Revenue Code, 26 U.S.C.A. § 145(b).[1]

The indictment was returned by the Grand Jury on January 14, 1952. On February 18, 1952, the defendant moved to dismiss the indictment and to require the taking of testimony of the members of the grand jury and the production of the transcript of the proceedings before the

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[1] 26 U.S.C.A.

Sec. 145. Penalties * * *

(b) Failure to Collect and Pay Over, or Attempt to Defeat or Evade Tax—

Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

grand jury. The United States voluntarily filed two bills of particulars. A motion for a further bill of particulars was overruled. After defendant had been arraigned and entered a plea of not guilty he renewed his motion to dismiss the indictment, require the testimony of the grand jury to be taken and to produce the transcript of the testimony. Both motions were denied.

On May 20, 1952, prior to the introduction of evidence one juror was released by the trial judge on the ground that he was disqualified and an alternate juror was substituted for him.

The trial was concluded on May 30, 1952. The defendant offered no evidence but moved for a judgment of acquittal. The motion was denied, and the jury returned a verdict of guilty on each of the three counts. On June 23, 1952, the court imposed a general sentence of three years' imprisonment and a fine of $10,000. Notice of appeal was filed June 30, 1952.

The trial was commenced on May 19, 1952, and concluded on May 30th. The defendant's brief fills 115 printed pages and cites 40 cases, four text books, two statutes and two Federal Rules of Criminal Procedure. To discuss each point and each argument separately would extend this opinion to unreasonable length.

The defendant contends that the court erred: 1. In refusing to dismiss the indictment; 2. In dismissing a juror and substituting an alternate; 3. In holding that the evidence was sufficient to support the conviction on each of the three counts; 4. In denying his request for a further bill of particulars; 5. In receiving in evidence the testimony of witnesses Weinstock, O'Gordon and Kleven, together with certain exhibits; 6. In permitting the government attorney to comment prejudicially on defendant's

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failure to take the witness stand in his own defense; 7. In failing to give requested instructions and in giving certain instructions; and 8. In admitting incompetent evidence.

The defendant's first contention, namely, that the court erred in refusing to dismiss the indictment upon defendant's motion is predicated upon two subordinate contentions: first, in general, that there was no competent evidence to support a finding by the jury that the defendant willfully attempted to evade and defeat a tax; and, second, the court erred in refusing to permit the evidence before the grand jury to be made available to the defendant and his counsel.

The court properly instructed the jury that the defendant is presumed to be innocent of the crimes alleged against him in the indictment, and that the burden was upon the government to prove him guilty beyond a reasonable doubt. That burden in this case, in which a violation of § 145(b) of the Internal Revenue Code, supra, is charged, required proof (1) that a tax was due from defendant to the government for each of the years charged; (2) that the defendant attempted to evade payment of that tax; and (3) that his attempt so to evade payment was willful.

Failing to secure the cooperation of the defendant in its investigation of his income for the years involved, the government used the net worth and gross expenditures method of proving the increase in defendant's net worth from year to year. This method has been approved by this and other courts. *Leeby* v. *United States,* 8 Cir., 192 F.2d 331; *Schuermann* v. *United States,* 8 Cir., 174 F.2d 397; *Pollock* v. *United States,* 5 Cir., 202 F.2d 281; *United States* v. *Yeoman-Henderson, Inc.,* 7 Cir., 193 F.2d 867; *Gariepy* v. *United States,* 6 Cir., 189 F.2d 459; *Bell* v. *United States,* 4 Cir., 185 F.2d 302; *Brodella* v. *United States,* 6 Cir., 184

F.2d 823. The purpose of the government's evidence by this method is to show that the net worth of the taxpayer increased from year to year from a fixed starting point in amounts greater than shown on his income tax returns.

Here the government used as the starting point the net worth of defendant at the end of the year 1936 as determined from his own affidavit filed with the Bureau of Internal Revenue in 1937. Starting with the date given in that affidavit the investigators for the government found defendant's net worth at the end of the year 1936 to be $18,578.78.

The government introduced evidence to show that defendant's net worth increased thereafter so that at the close of 1944 it was $231,029.26; in 1945 it was $270,968.33; in 1946 it was $296,087.27; and in 1947 it was $322,877.34. The defendant's taxable net income as reported in his returns for the three years involved was for 1945, $20,170.11; for 1946, $27,100.99; and for 1947, $20,609.29. His taxable net income as claimed by the government was for 1945, $43,690.11; for 1946, $36,799.97; and for 1947, $41,453.07. And his federal income taxes which should have been reported and paid, but were not, were for 1945, $15,044.06; for 1946, $5,829.41; and for 1947, $12,067.55.

In arriving at these figures the government investigators compiled and analyzed statistics for the years 1936 to and including 1947 showing defendant's cash deposits in banks, his United States bonds purchased and held, his receivables, his investments in marketable stocks and bonds, stocks of operating companies, investments in real estate and other property, and his liabilities for mortgages, other loans and accounts payable; and from all such data arrived at a statement of his taxable income for all three years.

This written undisputed evidence was all introduced in evidence by the government; and it was sufficient to war-

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rant the submission of the case to the jury and to support the verdict, requiring an affirmance of the judgment, unless some other alleged error of the court requires a reversal. *Pollock* v. *United States,* 5 Cir., 202 F.2d 281.

We shall next consider defendant's objections to the grand jury proceedings. It is asserted that the court erred in refusing to permit the evidence taken before the grand jury to be made available to the defendant and to his counsel. It is the law that matters occurring before a grand jury may not be disclosed to the defendant nor to his counsel unless "permitted by the court . . ." Rule 6(e) of the Federal Rules of Criminal Procedure. Two judges in this case denied the motions of defendant calling for a transcript of the evidence taken before the grand jury. The question for decision here, therefore, is whether the rulings of these judges upon the motions so made were an abuse of discretion on their part.

The motions in question asked the court—

1. To dismiss the indictment . . .;

2. To require the members of the grand jury . . . to disclose matters occurring before such grand jury; and

3. To permit the furnishing to counsel for defendant of a stenographic report of the proceedings before the grand jury when the case against the defendant was presented.

Counsel for defendant filed with the motion his affidavit in which he avers that he had investigated the circumstances pertaining to the proposed prosecution of his client; that he had been informed that representatives of the newspapers were outside the grand jury room on the morning of January 14, 1952, when the grand jury was in session; that it appeared in one newspaper of January 15,

1952, that the grand jury was called into session at 10:00 a.m. to receive instructions; that at 10:30 a.m. that same day it commenced hearing testimony; that at 11:30 a.m. word was sent that it was ready to report; and that it made its report at 11:45 a.m. It was further averred that only one witness was called before the grand jury and that such witness was the special agent of the Intelligence Unit of the Bureau of Internal Revenue who directed the investigation of the taxpayer's affairs.

It developed that the special agent referred to was George H. McKusick who testified at the trial and whose testimony for the government is reviewed above. He testified as to the method adopted, that is the net worth method, and the findings of the investigators. Reviewing that evidence indicates that not more than an hour or at most an hour and a half would be necessary to place it before a grand jury or a petit jury in case no time was consumed by counsel's objections and arguments to the court on admissibility. The evidence was admissible not only before the grand jury but also upon the trial. We do not think the judges abused their discretion in denying the motion.

Further a trial court's exercise of discretion in denying a motion to quash or dismiss an indictment because of irregularity, if any, in grand jury proceedings is not ordinarily reviewable. *United States* v. *Holmes*, 3 Cir., 168 F.2d 888. The same rule applies to defendant's motion for a bill of particulars. *United States* v. *Rosenburgh*, 74 U.S. 580; *Wong Tai* v. *United States*, 273 U.S. 77, 82; *Knauer* v. *United States*, 8 Cir., 237 F. 8; *Stewart* v. *United States*, 8 Cir., 300 F. 769; *Bedell* v. *United States*, 8 Cir., 78 F.2d 358; *Pines* v. *United States*, 8 Cir., 123 F.2d 825; *Braatelien* v. *United States*, 8 Cir., 147 F.2d 888.

It is next contended that the court erred in receiving the testimony of one Joseph A. O'Gordon and Exhibits 70 and

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71. Reference to the testimony discloses that O'Gordon representing the defendant in the fall of 1950 discussed with representatives of the Bureau of Internal Revenue some aspects of defendant's business. The revenue officer submitted to O'Gordon a list of questions to which he requested answers. Answers of the defendant were obtained by O'Gordon on a separate sheet of paper and delivered to the revenue agent. O'Gordon was called as a witness by the government and identified the paper containing the list of questions as Exhibit 70 and the paper containing the answers as Exhibit 71. They were received in evidence over the objection of counsel for defendant.

The objection was on two grounds: first, that the lawyer-client relation existed between defendant and O'Gordon and the answers were privileged, and further they were incompetent because they were submitted as part of a proposed settlement of a civil case. O'Gordon at the time in question was not negotiating with the revenue officer as a mere attorney. He was acting as defendant's agent with a power of attorney. In that capacity he secured defendant's answers to the questions submitted and returned them to the officer. Under these circumstances they were admissible. In *American Fur Co.* v. *United States,* 2 Peters 358, 364, 27 U.S. 229, 233, the Supreme Court say: ". . . whatever an agent does or says, in reference to the business in which he is at the time employed, and within the scope of his authority, is done or said by the principal; and may be proved, as well in a criminal as a civil case; in like manner as if the evidence applied personally to the principal." The testimony objected to here was clearly admissible. *Himmelfarb* v. *United States,* 9 Cir., 175 F.2d 924. The information requested was furnished by Banks to O'Gordon for the sole purpose of giving it to McKusick in answer to McKusick's questions. O'Gordon was therefore acting within the scope of his authority as Banks' agent.

The defendant next contends that the court erred in admitting the testimony of the witness Gerald O. Kleven, an expert called by the government, and in admitting Exhibits 224, 225, 226, and 227.

Exhibit 224 is a summary of all the evidence in the case. Exhibit 226 consists of a calculation by the witness of the differences between the net income reported by the defendant in his income tax returns and the net income shown by the government's evidence, including the amount of taxes due according to each such net income and the differences between the taxes so calculated. Exhibits 225 and 227 are merely enlarged copies of exhibits 224 and 226 respectively.

That such expert testimony is admissible in cases of this character has been decided by this court and other courts frequently. See *Myres* v. *United States*, 8 Cir., 174 F.2d 329, cert. den., 338 U.S. 849; *Kirsch* v. *United States*, 8 Cir., 174 F.2d 595; *Cave* v. *United States*, 8 Cir., 159 F.2d 464, cert. den., 331 U.S. 847, rehear. den., 332 U.S. 786; *Gieckman* v. *United States*, 8 Cir., 80 F.2d 394, cert. den., 297 U.S. 709; *United States* v. *Johnson*, 319 U.S. 503.

Counsel for defendant in their brief say: "While there is an appropriate area in tax cases of this kind for expert testimony . . . there are limitations as well", and they contend that this case comes within those limitations. Attention is first directed to the case of *Kirsch* v. *United States, supra*, in which this court reversed the conviction of the taxpayer because the witness assumed without qualification that all of the defendant's deposits in a certain account represented income for tax purposes, although the government's own evidence showed that a large part of the deposits did not represent income. That is not the situation

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here. The *Kirsch* case is not in point. Other objections to these exhibits are trivial and without merit.

Defendant contends further that the court erred in admitting the testimony of Leonard H. Weinstock as to the defendant's living expenses for the years 1945, 1946, and 1947. It will be recalled that Mr. George H. McKusick was in charge of the investigation of defendant's income for the years involved. Defendant gave Weinstock a power of attorney to represent him in conferences with McKusick. McKusick furnished Weinstock a copy of his estimate of defendant's living expenses for submission to defendant. Weinstock was called as a witness to testify to the schedule of living expenses for the years in question, but claimed to have forgotten the amounts agreed upon, whereupon he was cross-examined by counsel for the government over objection of defendant's counsel. There was no error in admitting his testimony under these circumstances. It is the law that where a party, in good faith, has called a witness in his behalf and is surprised by his adverse testimony, he may, in the court's discretion, be allowed to cross-examine or to show by others, that the witness has previously made statements materially at variance with his present testimony. *Ellis* v. *United States,* 8 Cir., 138 F.2d 612; *Lewis* v. *United States,* 8 Cir., 153 F.2d 724.

The defendant complains that the court erred in dismissing a juror after he had been selected and substituting an alternate for him. The court consistent with the provisions of Rule 24 of the Federal Rules of Criminal Procedure examined the prospective jurors on their voir dire. The next morning after the jury and the alternates had been selected the court directed that the juror in question be brought before the court from the jury room when he was reminded that at the voir dire on the preceding day in

answer to a question he stated that he had his tax matters all straightened out with the government. Upon further questioning by the court it then developed that he had trouble over his tax problems with the government in 1945; that he had made returns for 1948 and 1949; that he had not paid all the taxes due for those years and that he had not made a return for 1950 or 1951, but that he had intended to do so. The court thereupon excused him from the jury and substituted an alternate juror. It is clear that on his voir dire examination the juror, whether intentionally or not, misled the court and counsel in reference to his tax troubles with the government. Under these circumstances the court did not abuse its discretion in dismissing the juror and substituting an alternate. No good reason to the contrary is suggested by counsel for defendant. His contention is that defendant was entitled to have the juror remain on the panel. But no proceedings other than the selection of the jury had been had. Under these circumstances the defendant's contention is without merit.

Another contention of defendant is that the evidence fails to disclose an affirmative willful attempt to evade and defeat a tax and hence there is no offense under 26 U.S.C. § 145(b). To support this contention the case of *Spies* v. *United States*, 317 U.S. 492, is cited. In fact the opinion in that case supports his conviction, and not his contention. That opinion, quoted by defendant in his brief, points out that a willful attempt to evade may be inferred by ". . . concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime."

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Here the evidence shows that defendant failed to report his entire income for taxation; that he paid only a part of the taxes which he should have paid. He held property in the names of nominees; he procured cashier's checks with which he paid for property. He did not furnish to his attorney, Mr. Weinstock, who made out his income tax returns, information necessary to make accurate returns. A part of such information which he furnished was on adding machine tape. He simply told Weinstock that the source of such income was "wagering." This, of course, referred to a part of his income only. The evidence shows that the total income included in his returns was much less than his actual income. The jury could very well find from all the testimony that defendant willfully attempted to evade and defeat his federal income taxes.

It is further charged that government attorneys prejudicially commented on the failure of defendant to take the witness stand in his own defense. No direct charge of that kind was made by government counsel. What occurred in substance was that in argument to the jury and in analyzing the government's evidence they pointed out that the government's evidence was undisputed.

No objections were made nor exceptions taken to these references at the time they occurred. Such references did not directly call the attention of the jury to the fact that defendant did not testify and no comment was made on his failure to testify further than to point out that the government's testimony was undisputed. In this situation there is no question to review. *Johnson* v. *United States*, 318 U.S. 189. Further, "The statement of counsel that certain evidence is not denied is not a violation of the safeguard vouched an accused by the law." *Baker* v. *United States*, 8 Cir., 115 F.2d 533, 544, cert. den., 312 U.S. 692.

In the cited case the court quotes with approval the statement of the court in *Lefkowitz* v. *United States*, 2 Cir., 273 F. 664, 668, that "It is only objectionable to comment upon the failure of the defendant personally to testify; and if at at the close of the whole case any given point stands uncontradicted, such lack of contradiction is a fact, an obvious truth, upon which counsel are entirely at liberty to dwell."

Here there was no direct reference to the failure of Banks to testify. The law was not, therefore, violated. In *Morrison* v. *United States*, 8 Cir., 6 F.2d 809, 811, Judge Booth speaking for this court said: "Comment by court and counsel that certain testimony is uncontradicted is common, oftentimes helpful, and very generally held to be without error." Citing authorities.

Counsel for defendant requested 14 numbered instructions to be given to the jury. His careless criticism of the court is illustrated by his assigned error for alleged failure to give these instructions. His first requested instruction reads:

"For proof of its case, the government relies upon circumstantial evidence. Circumstantial evidence consists of facts proved from which the jury may infer by process of reasoning certain ultimate facts. A conviction may be had upon circumstantial evidence, but to warrant a conviction on such evidence the proven facts must not only be consistent with the hypothesis of guilt and point surely and solely in the direction of guilt, and must clearly and satisfactorily exclude every other reasonable hypothesis except that of guilt."

In his brief counsel says: "Requested instruction No. 1 pertained to circumstantial evidence and while the court did state something about circumstantial evidence it refused to state that the government relied upon circumstantial evidence."

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A comparison of the requested instructions with the instructions given is convincing that the court most carefully protected the rights of the defendant and that as a whole the given instructions were more favorable to the defendant than were the requested instructions. The court gave requested instruction No. 1 on circumstantial evidence in the exact language of the request.

The whole record discloses, we think, that the defendant had a fair trial. The judgment appealed from is accordingly

Affirmed.

[fol. 19] (Judgment.)

United States Court of Appeals
for the Eighth Circuit.

September Term, 1952.

Wednesday, May 27, 1953.

Thomas W. Banks, Appellant,
No. 14,648. vs.
United States of America.

Appeal from the United States District Court
for the District of Minnesota.

This cause came on to be heard on the record from the United States District Court for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the Court below, Thomas W. Banks, do surrender himself to the custody of the United States Marshal for the District of Minnesota, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

May 27, 1953.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 14,648

THOMAS W. BANKS,

Appellant,

vs

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, THIRD DIVISION

PETITION FOR REHEARING

A. Prefatory Statement

The appeal in this case was argued before the Court on March 13, 1953. On May 27, 1953 there was filed with the Clerk of this Court the opinion of this Court affirming the judgment of the District Court. This petition for rehearing is made pursuant to Rule 15 of this Court. In compliance with such rule there is included herein the necessary certificate that this petition is filed in good faith and is believed to be meritorious. The matters which are hereinafter set forth are deemed to be material matters of law and fact which

were inadvertently overlooked in the opinion filed on May 27, 1953.

B. The Net Worth of Appellant at the Starting Point (December 31, 1936) of the Government's Net Worth Case was not Proved.

The so-called increase in net worth method or net worth and expenditure method of proving a criminal case under 26 U.S.C. 145(b) is but a type of circumstantial evidence. It is well established that circumstantial evidence is a basis for conviction only if the evidence is inconsistent with innocence and excludes every reasonable hypothesis except that of guilt. It has been held with uniformity that where the government relies on the increase in net worth plus expenditures method to prove unreported net income, the case fails if the basic premise, namely, that the net worth of the appellant at the starting point (December 31, 1936) is not correct. The opinion of the Court (page 4 second complete paragraph) recognizes that the government used the so-called net worth and expenditures method, and recognizes that the starting point of the government's net worth case was December 31, 1936 and states that the government investigators found appellant's net worth at the end of the year 1936 to be the sum of $18,578.78. We submit that the opinion inadvertently overlooks the fact that the government failed to establish the necessary basic premise that the so-called starting point, the net worth as of December 31, 1936, was correct. It is true, as the opinion of the Court states, that the government used as its starting point the net worth of the appellant as determined by it from the appellant's affidavit (Ex. 33) and the record does not reflect that anything

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else but such affidavit was used to determine such starting point. The affidavit of a taxpayer can only be used as the exclusive means to determine the net worth of such taxpayer as of a certain date if such affidavit lists all assets and liabilities of such taxpayer as of such date. If the affidavit does not contain all the assets and liabilities of a taxpayer as of a certain date, then such affidavit alone is insufficient upon which to base an accurate determination of a taxpayer's net worth as of such date. A critical examination of appellant's affidavit of July 2, 1937 discloses it has at least the following deficiencies which prevent an accurate determination of the appellant's net worth as of December 31, 1936:

1. It does not purport to include or show all of the assets of the appellant or of his wife. Nowhere in the affidavit is there a statement to that effect.

2. There is no statement in the affidavit regarding cash on hand of the appellant or of his wife. Mr. McKusick testified (R. 398) that he did not know how much cash the taxpayer or his wife had on hand July 2, 1937 or on December 31, 1947. Mr. Kleven testified there was no exhibit in evidence which showed the amount of cash the appellant had in his possession on December 31, 1936. (R. 536).

3. There is a reference to the existence of a safety deposit box in a bank in Minneapolis standing in the name of the appellant and his wife but there is no statement whatsoever regarding the contents of the box. Mr. McKusick on direct examination stated (R. 331) that he looked for safety deposit boxes in the name of the appellant and found some but did not examine the contents.

4. There is no statement in the affidavit about the stocks listed in the statement attached to the affidavit concerning the cost of the stocks or whether they constitute all of the stocks owned by the appellant. The

statement is that he had these stocks in his possession and they are worthless.

5. Nothing is contained in the affidavit as to loans owing by third persons to the appellant or his wife.

6. The Bureau of Internal Revenue knew that the appellant had the sum of $7,800 in September, 1937, because the appellant paid them that amount of money at that time (R. 434). Notwithstanding the possession of this knowledge the government refused to give appellant credit for having any cash in the beginning net worth.

The foregoing demonstrates that the affidavit did not list all the assets and liabilities of the appellant. Since the affidavit did not list all the assets and liabilities of the appellant as of a certain date it cannot be used to accurately determine the appellant's net worth as of such date. Since it is necessary to prove a correct starting point as part of an entire plan to prove unreported income through increases in net worth, the proof fails to meet the necessary standard of proof and the case fails because of the insufficiency of the evidence to support the conviction.

C. Exhibit 224 is not a Summary of all the Evidence in the Case.

On page 8 of the Court's opinion the following statement is made: "Exhibit 224 is a summary of all the evidence in the case". We respectfully submit that Exhibit 224 is *not* a summary of all the evidence in the case and contend that the record demonstrates that it is not a summary of all the evidence in the case. The direct testimony and cross-examination of Gerald O. Kleven pertaining to Exhibit 224 is in the record at pages 453-569.

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The following portion of the record shows that it was the position of the government and of the witness that as an expert witness he had the right to reject that part of the government's testimony which was desirable and accept such parts as were desirable.

Record p. 453-454:

Q. From the exhibits in this case and from the oral testimony adduced here in this court room as to facts, are you able to make an analysis and a summary under the net worth method to show the income of this defendant from the years 1936, 1941, '42, '43, '44, '45, '46 and '47?

A. Yes.

Q. Have you reduced such a summary to chart form?

A. Yes, we have.

Q. Mr. Kleven, showing you Government's Exhibit 224, can you tell me what that is?

A. That is a typewritten copy of the figures that I prepared of the net worth summary.

Record p. 459-461:

Mr. Hoffmann: May we say one thing at this time, Your Honor?

The Court: Yes.

Mr. Hoffmann: I trust the Court, prior to its statement now completed as part of the record, was mindful of this witness' testimony in response to the question of the District Attorney as to what the computations of this witness, as represented by 224, were based upon. The record, I am certain, Your Honor, will disclose the answer of the witness to have been that his computations, as now reduced to 224 and as proposed to be reflected by the chart that the District Attorney refers to, were based upon, he said, "All of the Exhibits in this case, and, most important, Your Honor, "all of the testimony

in this case"—which means up to the moment of his so speaking. He said that he was in the court room all of the time during the course of this trial; that he took into consideration all of the testimony adduced up to the time of his speaking, and then, upon a question put to him by Mr. Graff, it develops that the chart here referred to as Exhibit 224 was prepared last Friday night, May 23rd, and that, in the main, Your Honor, the witness' testimony went on to relate that it was prepared by him a long time prior to the commencement of this trial, but in effect as to some minor alterations, had only those changes as of the time of last Friday night. Your Honor, the witness testified that he made the exhibit in 1951, and the Government's offer, simply and briefly, our point is, is based upon this witness' statement in response to the foundation questions that this exhibit reflects his understanding and acceptance and interpretation of all of the evidence in this case.

Mr. Landrum: May I say a word, Your Honor?

The Court: Yes.

Mr. Landrum: Counsel has misquoted just one little word. That little word was it was based upon the testimony as to 'facts' in this case,—facts. Testimony as to facts is what the witness said.

Mr. Hoffmann: Your Honor, I shall be glad in behalf of the defendant to have the District Attorney in behalf of the Government state that is the basis of their offer as to foundation of this exhibit, because now it is completely obvious that they are asking this witness to interpret testimony and determine what part of the testimony constitutes a fact and what part is rejectable to him. It is, therefore, an invasion of the province of the jury.

Mr. Landrum: I do not care to argue it any more.

Mr. Kleven testified (R. 533) that in preparing Exhibit 224 he had the records of prior revenue agents who had completed a report on the appellant covering the years 1920 to 1923 and which was on a net worth basis. He stated he took the ending net worth as shown in that report and worked it down to the end of the three years. The records of such prior revenue agents were not introduced in evidence in this case and yet it is apparent that Mr. Kleven relied upon such report to make up Exhibit 224. Mr. Kleven testified further that he disregarded the dates of acquisition of stocks shown on Exhibit 4 (the 1940 tax return) because of something he read in a special agent's report which satisfied him that the stock was not owned in 1935 as stated in the 1940 return. In explanation he stated he accepted the conclusions of the agents. The conclusions and reports of these agents were not introduced in evidence in Court and yet such conclusions and reports were relied upon by Mr. Kleven in making up Exhibit 224. Mr. Weinstock testified concerning the so-called trust account but such testimony was rejected entirely by Mr. Kleven in making up Exhibit 224 because as Mr. Kleven stated it, "he testified erroneously" (R. 562). The only evidence in the case was introduced by the government and the only conceivable area in which an expert could testify was on the basis of all evidence introduced into the case. There is neither reason or authority for the support of the proposition that an expert may give an opinion as expressed on Exhibit 224 based upon the acceptance of some testimony and based upon the rejection of other testimony and based upon reports and conclusions not in evidence in the case. That is precisely what Mr. Kleven did in preparing Exhibit 224 and that is why the statement in the opinion is in error. The error complained of is of course,

that Mr. Kleven by his testimony and by the use of Exhibit 224, unlawfully invaded the province of the jury. What has been said about Exhibit 224 is equally applicable to Exhibit 225, the very large exhibit.

D. Evidence Insufficient Because Assets of Wife of Appellant were Treated as Assets of Appellant.

While this point was included in the brief and orally argued there is nothing contained in the opinion on this point and it is assumed that the omission to rule on this point was inadvertent. Beginning with the government's starting point for its net worth case and ending with the amount of the increase in net worth for the last year the government included assets of the wife of the appellant in the assets of appellant. It was apparently assumed that everything that belonged to Rita Banks belonged to the appellant notwithstanding the fact that she made her own tax returns and had her own separate property. It is, of course, elementary that in attempting to ascertain the beginning net worth and the net worth increase from year to year for a person there can only be used the property of such person. If it is the claim of the government that the property and income of Rita Banks is the property and income of the appellant, then such contention must be proved by competent evidence which was not done in this case. If property is acquired and placed in the name of husband and wife either as joint tenants or as tenants in common it is generally regarded as being a gift at that time of an undivided one-half interest in the property. If property is acquired by gift, the income from such property is, of course, the property of the donee of the gift. No effort was made to differentiate be-

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tween the property of the appellant and his wife and no effort was made to differentiate between the income of the appellant and the income of his wife. All income and property were lumped together as if all were the income and property of the appellant. The result of this lumping is, of course, that as far as the appellant was concerned the beginning net worth, the so-called corrected net income, the increases in net worth, and the computed tax deficiency were all incorrect. There was no effort made to establish what belonged to the wife and there was no effort made to subtract what belonged to the wife from that of the whole.

The method employed by the government sought to prove unreported income by the increase in net worth and expenditures method, which is but a type of circumstantial evidence. The inclusion of the wife's income and property made impossible the use of the circumstantial evidence rule to sustain a conviction because it did not foreclose every other reasonable hypothesis except that of guilt.

E. The Grand Jury Proceedings.

It was contended in appellant's original brief (pp. 13-32) that the indictment in this case was not obtained on evidence that was sufficient and in fact was based upon hearsay and incompetent evidence. The court's opinion on page 7 states that a review of Mr. McKusick's testimony "indicates that not more than an hour or at most an hour and a half would be necessary to place it before a grand or a petit jury - - -". We believe this statement to be inadvertent for several reasons. It assumes that Mr. McKusick testified to exactly the same things before the grand jury that he did before the petit jury. There is absolutely no basis for this

assumption in the record. This statement further assumes that if Mr. McKusick had so testified before the grand jury that there would have been sufficient evidence to support an indictment. We submit this assumption is also false. If you took only Mr. McKusick's testimony upon the trial, a prima facie case would not have been made against the appellant. At the trial there were over forty witnesses who testified to facts and produced and identified records which facts could not have been testified to by Mr. McKusick and which records could not have been identified by Mr. McKusick unless it was by means of hearsay and incompetent testimony. It is a singular fact that the government has never denied that the indictment was obtained as alleged by the appellant. The Court states in its opinion that a trial Court's exercise of discretion in denying a motion to quash an indictment is not ordinarily reviewable. The point that complaint was made about in this Court was that the trial Court refused to permit appellant to call witnesses to prove his contention, if the trial Court did not accept as facts the allegations in appellant's motions. (R. 18, 19, 20, 56 and 57).

On the other hand, if the Court did accept as facts the allegations in appellant's motions, then it was error not to quash the indictment.

F. Answers Furnished by O'Gordon.

On page 8 of the Court's opinion in discussing the answers of O'Gordon on Exhibit 71 the following statement is made: "The information requested was furnished by Banks to O'Gordon for the sole purpose of giving it to McKusick in answer to McKusick's questions". We believe this statement to be inadvertent because there is nothing in the record

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to show that the answers given by O'Gordon were furnished by him by the appellant. The record fails to show that the appellant ever saw, furnished or agreed to the answers on Exhibit 71. For this reason we contended that Exhibit 71 was not properly admissible against appellant and its admission into evidence was error.

G. Weinstock's Testimony as to Living Expenses was not Substantive Testimony.

It was necessary as a part of the government's case to prove the living expenses of the appellant. While the indictment in this case was returned on January 14, 1952, (R. 1) Mr. Weinstock was questioned before the Grand Jury on May 2, 1952 (R. 271) about living expenses of the appellant. At the trial upon a claim of surprise on the part of the government, the government was permitted to cross-examine Mr. Weinstock. We contended that under the circumstances that a proper basis for a claim of surprise and the allowance of cross-examination of their own witness should not have been permitted. This Court's opinion indicated that the cross-examination was permissible under the circumstances. It was the important part of our point that the testimony elicited by the government by its cross-examination of Mr. Weinstock was not substantive evidence in the case. We believe that the Court inadvertently omitted any consideration of such point. We believe it to be a settled proposition of law that testimony elicited by cross-examination of one's own witness under a claim of surprise about a prior contradictory statement is not substantive evidence. Mr. Weinstock's testimony. therefore, is not substantive testimony in the case and without it the government has not made out a prima facie case.

H. Requested Instruction Number One.

On page 13 of the Court's opinion there is discussed the instructions requested to be given by the appellant. In its opinion the Court states: "His careless criticism of the Court is illustrated by his assigned error for alleged failure to give these instructions". The opinion then states after quoting the requested instruction and quoting the assigned error at the end of the page: "The Court gave requested instruction No. 1 on circumstantial evidence in the exact language of the request". We believe this to be inadvertent because the Court did not give requested instruction number 1 in the exact language of the request. The requested instruction number one is contained in the record at page 579-580. It will be noted that the first sentence of the requested instruction is entirely missing from the instruction as given. It was and still is our position that the Court should have given the instruction that the government's case was based upon circumstantial evidence and we submit the request therefor was proper. In *Pollock v. United States*, 202 F. 2d 281, 5 C. A. cited by the Court on page 5 of its opinion a part of the instructions of the trial Court in that case to the jury are contained in the footnote on page 285. The reviewing Court in that case commends the trial Court on its instructions which include a statement that the case is based upon circumstantial evidence. We trust that the foregoing explanation is sufficient to show that our criticism of the trial Court was not "careless" as indicated by the Court in its opinion. In substance we are of the position that where you have circumstantial evidence in a case the trial Court should so advise the jury and then give them the rule to apply to the circumstantial evidence.

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I. Conclusion.

We respectfully submit that these are substantial and material matters of law and fact that should receive further consideration by this Court. We sincerely believe that additional hearing and argument before the Court will establish that the judgment in this case should be reversed. We, therefore, respectfully submit our request for a rehearing.

JEROME HOFFMANN
RICHARD E. KYLE
JOHN W. GRAFF
Attorneys for Appellant

J. Certificate of Counsel.

We hereby certify, in compliance with Rule 15(b) of this Court, that this petition is filed in good faith and is believed to be meritorious.

Respectfully submitted,

JEROME HOFFMANN
RICHARD E. KYLE
JOHN W. GRAFF
Attorneys for Appellant

(Endorsed): Filed in U. S. Court of Appeals, Jun. 9, 1953.

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[fol. 33] (Order denying Petition of Appellant for Rehearing.)

September Term, 1952.

Tuesday, June 16, 1953.

The Court has considered the petition for Rehearing filed by Appellant herein and It is Now Here Ordered that said Petition be and is hereby denied.

June 16, 1953.

(Motion of Appellant for Stay of Mandate.)

The above-named appellant hereby respectfully moves the Court for an order staying the mandate for a period of at least thirty (30) days in the above-captioned matter pending application by the appellant to the United States Supreme Court for a writ of certiorari.

HOFFMANN, DONAHUE
& GRAFF,

JEROME HOFFMANN,

RICHARD E. KYLE,

JOHN W. GRAFF,
Attorneys for Appellant.

(Endorsed): Filed in U. S. Court of Appeals, Jun. 20, 1953.

[fol. 34] (Order Staying Issuance of Mandate.)

September Term, 1952.

Thursday, June 25, 1953.

On Consideration of the motion of the appellant for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of

this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

June 25, 1953.

[fol. 35] (Clerk's Certificate.)

United States Court of Appeals
for the Eighth Circuit.

I, E. E. Koch, Clerk of the United States Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains record printed by appellant and supplemental record printed by appellee on which the appeal from the United States District Court for the District of Minnesota was heard in said Court of Appeals, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Court of Appeals for the Eighth Circuit, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Court of Appeals wherein Thomas W. Banks was Appellant and the United States of America was Appellee, No. 14,648.

And I do further certify that there was filed on February 7, 1953, and submitted to said Court of Appeals, in said cause, volume containing Index to and Description of Exhibits together with Reproduction of Certain Exhibits, and said volume is also transmitted to the Supreme Court of the United States for filing in connection with petition for writ of certiorari.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, on the 1st day of July, A. D. 1953.

E. E. KOCH,
Clerk of the United States Court of Appeals for the Eighth Circuit.

(Seal)

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SUPREME COURT OF THE UNITED STATES

No. 859, October Term, 1952.

THOMAS W. BANKS,

Petitioner,

vs.

UNITED STATES OF AMERICA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner(s),

It is ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 14, 1953.

s/ Tom Clark
Associate Justice of the Supreme Court of the United States

Dated this 7th day of July, 1953.